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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-5853 — 377-3721

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NO. _____

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

vs.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated, and

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on August 15, 1973.

The appendix below is hereinafter designated by the symbol "App."

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

The opinion and final judgment of the District Court is reported in 332 F.Supp. 1107 (S.D Fla.1971), and appears in the Appendix hereto.

The order adopting plan for providing for preliminary hearings is reported in 336 F.Supp. 490 (S.D.Fla.1972), and appears in the Appendix hereto as does the findings and conclusions relative the committing magistrate system of Dade County, Florida.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 15, 1973, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a person in state custody has a federally protected right to a preliminary hearing.

2. Whether a United States District Court judge has jurisdiction to interfere by declaratory and injunctive action with duly constituted state criminal proceedings on the question of preliminary hearings.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Fourth Amendment to the Constitution of the United States:

> "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

2. Fourteenth Amendment to the Constitution of the United States:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Respondents Pugh and Henderson, joined subsequently by intervening Respondents Turner and Faulk, filed a class action in the United States District Court for the Southern District of Florida, seeking an injunction and a declaration that a preliminary hearing before a committing magistrate on probable cause after arrest and before trial

was compelled by the Fourth Amendment and by the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States (App. 29). Jurisdiction was founded upon 28 U.S.C. 1343(3) (4) and 42 U.S.C. 1983. The respondents asked the Court to mandatorily compel, via injunction, the petitioner, State Attorney Gerstein, among others, to grant such a hearing to respondents and members of their class and to declare that they were so entitled to such a hearing (App. 29).

On April 6, 1971, petitioner Gerstein filed his Answer and a Motion for Summary Judgment and in a memorandum of law in support thereof admitted as undisputed facts that:

> 1. The respondents were charged at said time with violations of the Florida Statutes.
>
> 2. They had been charged by Information as permitted by Article I, Section 15(a) of the Florida Constitution.
>
> 3. That prior to the filing of the Information, there was no preliminary hearing.
>
> 4. That the Informations were filed by petitioner Gerstein or by one of his duly appointed Assistant State Attorneys, under and by his authority.
>
> 5. It is the policy and practice of the petitioner Gerstein, his agents, servants and employees, to file Informations based on an independent examination of the facts, notwithstanding that there has been no preliminary hearing.

> 6. It is the policy and practice of the petitioner Gerstein, his agents, servants and employees, to resist any attempt to have preliminary hearings after an Information has been filed or an Indictment has been found (App. 84).

In an order and final judgment filed October 12, 1971, the District Court said:

> "The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause." (App. 44)

The court accordingly granted the sought after relief to respondents and further directed petitioner and other public officials who are not parties hereto to submit a plan of implementation (App. 46). Thereafter, a plan submitted by the Sheriff of Dade County, E. Wilson Purdy, was adopted by the court. Inter alia, the plan required expeditious preliminary hearings before a magistrate for all persons arrested, whether with or without warrant. Under the plan, those not given such hearings were to be released immediately. (App. 47-54).

The Purdy Plan was stayed by the Court of Appeals pending appeal. During this period the judiciary of Dade County and other members of the criminal justice system effectuated their own plan providing for preliminary hearings. Subsequent to oral argument in the Court of Appeals the stay was vacated and the District Court was directed to make specific findings of fact on the constitutional deficiencies, if any, as between the Purdy Plan and the plan

then in effect in Dade County. (See opinion of Court of Appeals,) (App.2). The District Court, after oral argument, made its findings, taking into consideration the Amended Rules of Criminal Procedure issued by the Florida Supreme Court on December 6, 1972, effective February 1, 1973, which provide for a committing magistrate system but which still permit a state attorney to file a direct Information without a subsequent determination of probable cause by a magistrate (App. 55-69). The District Court did not further implement the Purdy Plan and the stay, for all purposes, has remained in effect. (See order of dismissal in Scaldeferri et al. v. Dan Satin et al.,) (App. 83).

In its letter to all counsel of record written June 1, 1973, the Court of Appeals inter alia asked, "In summary, just what if anything is left of this appeal?" (App. 73) In its joint memorandum of response, counsel stated that the major abiding substantive legal issue which remained intact was:

> "DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?" (App. 75)

In upholding the District Court, the Court of Appeals held that reasons of comity did not bar the suit of petitioners and that, therefore, the court "need not decide whether this situation comprises an exception to *Younger*."

[*v. Harris*, 401 U.S. 37] (App. 9). The court thereupon held that the Fourth and Fourteenth Amendments require that arrestees held for trial on informations filed directly by the state attorney must, without unreasonable delay, be given a preliminary hearing before a judicial officer. (App. 9-10, 21). The Court of Appeals also held that misdemeanants were also entitled to preliminary hearings except where they are out on bond or charged with violating ordinances carrying no possibility of pre-trial incarceration (App. 25).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Erroneous In That It Holds That The Fourth And Fourteenth Amendments To The Constitution Of The United States Require A State To Provide Preliminary Hearings Before Judicial Officers For All Defendants Incarcerated Awaiting Trial Upon Informations Filed By A State Attorney And Thus Presents An Important Question Of Federal Constitutional Law And The Decision Conflicts With Applicable Florida Law And With The Decisions Of This Court And Of Other Courts Of Appeals.

Both at the District Court level and before the Court of Appeals, petitioner argued, among other cases, as dispositive of the Fourth and Fourteenth Amendment questions this Court's decisions in *Hurtado v. California*, 110 U.S. 516 (1884) and *Lem Woon v. Oregon*, 229 U.S. 586 (1913). This argument was unavailing. The Court of Appeals erroneously found them inapplicable and held that they related to the due process question of the necessity for a magistrate's preliminary examination of probable cause prior to the filing of an information and were not persuasive as to the instant question.

The petitioner also cited as controlling authority *Ocampo v. United States*, 234 U.S. 91 (1914), and *Beck v. Washington*, 369 U.S. 541 (1962). The lower court summarily ruled that *Ocampo* "decided the narrow issue of the necessity for investigation by a judicial officer *before* arrest" (Emphasis by the Court). (App. 12). Thereafter the lower court quotes *Ocampo* to the effect that probable cause is neither a judicial act nor is it equivalent to an acquittal. This is petitioner's position exactly. For as this Court further said in *Ocampo* at page 100, "In short the function of determining that probable cause exists for the arrest of a person accused is only quasi judicial and not such that because of its nature it must necessarily be confined to a strictly judicial officer or tribunal."

Beck, supra, was disposed of by the lower court in a footnote as adding "nothing to Ocampo" in that *Beck* deals with "prior probable cause hearings." (App. 12). In so doing, the court ignored completely the following statement of law in *Beck:*

> "Ever since Hurtado v. California, 110 U.S. 516, 28 L.Ed.232, 4 S.Ct. 111 (1884), this Court has consistently held that there is no federal constitutional impediment to dispensing entirely with the grand jury in state prosecutions. The State of Washington abandoned its mandatory grand jury practice some 50 years ago. *Since that time, prosecutions have been instituted on informations filed by the prosecutor, on many occasions without even a prior judicial determination of 'probable cause'—a procedure which has likewise had approval here in such cases as Ocampo v. United States*, 234 U.S. 91, 51 L.ed.1231, 34 S.Ct. 712 (1914) and *Lem Woon v. Oregon*, 229 U.S. 586, 57 L.ed.1340, 33 S.Ct. 783 (1913)." [Emphasis supplied.]

Justice Clark in so writing for the *Beck* majority was certainly aware of Washington law which requires neither *prior nor subsequent* judicial determinations of probable cause. The law of that state is set out in *State v. Ollison*, (Wash. 1966) 411 P.2d 419. There the defendant after arrest on a warrant had a preliminary hearing date set by a justice of the peace for a "probable cause" determination. Prior to that date the prosecuting attorney filed an information in the superior court on the same charges. The defendant was subsequently arraigned, tried and convicted. The defendant on appeal argued that it was error not to grant a preliminary hearing *after* the filing in superior court of the direct information by the prosecutor. Finding no merit in this position the Washington Supreme Court said:

> "We see no error in the superior court denial of a preliminary hearing *after* the information had been filed. A prosecuting attorney in the exercise of his official powers, where he has good cause to believe that a crime has been committed and that he can prove the defendant is guilty thereof, may file an information directly in the superior court without a preliminary hearing. In such a case, the preliminary hearing is not deemed requisite to or an essential element of due process of law." [Emphasis supplied].

The direct filing of criminal informations without prior or subsequent judicial probable cause determinations

has long been sanctioned in Florida. §15 Declaration of Rights to the Florida Constitution; *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); *Bradley v. State*, (Fla. 1972) 265 So.2d 533; *Anderson v. State*, (Fla. 1970) 241 So.2d 390. It is also the practice, inter alia, in the states of Iowa, *State v. Clark*, (1965) 138 N.W.2d 120; Montana, *Petition of Knight*, (1964) 394 P.2d 855; Wyoming, *Orcutt v. State*, (1961) 366 P.2d 690, cert. denied 385 U.S. 874; Arkansas, *Beckwith v. State* (1964) 379 S.W.2d 19; and Connecticut, *State v. Hayes*, (1941) 18 A.2d 895. In the latter case the Connecticut Supreme Court said that state's attorneys have this power because they are invested with the common law power of attorney general. The filing of direct informations had been followed in Connecticut for nearly two centuries prior to 1941, and the practice, had, the court said, been "in vogue" prior to the adoption of the Connecticut constitution. It was further said by the court that "the investigation by the state's attorney and the determination by him that there is reasonable ground to proceed takes the place of a preliminary hearing by a magistrate and sufficiently fulfills all of the requirements of due process of law." [Citing, inter alia, *Hurtado v. California*, supra.]

The foregoing state authorities recognize the power of state prosecutors to sit, in effect, as a one man grand jury. The District Court thus should have given the same weight to a prosecutor's finding of probable cause as it did to a grand jury's. To the contrary it misconstrued Florida law entirely and exempted from judicial probable cause hearings persons charged with crimes by grand jury indictment (the same point was argued to and ignored completely by the Court of Appeals). The District Court, in so ruling, said that after a grand jury returns an indictment to a

judge, that judge reviews it and either issues an arrest warrant "and causes the indictment to be filed or dismisses the charge." App. 32. The Court then went on to say that this particular procedure provides "for a probable cause hearing, by a judicial officer, prior to trial and . . . [is] not therefore under attack in this litigation." (App. 33).

Under Florida law there is no probable cause determination by a judge as to criminal charges set out in indictments. The judge does not review the indictment and then "cause it to be filed" or dismiss the charge. Under Florida law and practice the judge presiding over a grand jury, once an indictment is handed up has only a ministerial function to perform. Under Amended Rule 3.130(k) of the Florida Rules of Criminal Procedure (formerly Rule 3.150[a]), "Upon the filing of either an indictment or information charging the commission of a crime, if the person named therein is not in custody or at large on bail for the offense charged, the judge *shall* issue or *shall* direct the clerk to issue, either immediately, or when so directed by the prosecuting attorney, a capias for the arrest of such person . . ." [Emphasis supplied.].

The very nature of the criminal jurisprudential system in Florida makes the District Court's error (ratified by the Court of Appeals) manifest when it speaks of preliminary review of an indictment by a judge. In Florida, once indicted, the next stop in the system for the defendant is not the judge presiding over the grand jury, but the trial court and arraignment and other proceedings therein.

Professor Wright, in 1 *Federal Practice and Procedure*, 137, §80, recognizes that it is grand jurors who determine probable cause and not a judge:

". . . It has recently been said that 'our federal courts uniformly have held that there is no necessity for a preliminary hearing after a grand jury has returned an indictment' [Citing *Crump v. Anderson* (D.C. Cir. 1965) 352 F.2d 649]. For this proposition an abundance of authority may be cited. If the only purpose of the preliminary examination is to determine whether there is good cause for holding the defendant, this is an entirely logical rule. The grand jury has determined the issue of probable cause and there is no need to have a determination by the magistrate. Accordingly, it is held that where a person is first arrested after indictment, rather than on complaint, he is not entitled to a preliminary examination . . . And finally if he is first held on a complaint, but thereafter an indictment is returned, a preliminary examination need not be held, or, if it has been commenced, it need not be concluded for the indictment is sufficient evidence of probable cause."

The Wright view as to indictments is applied in Florida to informations. *Karz v. Overton* (Fla. 1971) 249 So. 2d 763; *Maxwell v. Blount* (Fla. 1971) 250 So.2d 657.

A multitude of decisions from the various circuits was cited below for the proposition that due process does not mandate preliminary hearings in cases such as the instant one. These included *Scarborough v. Dutton* (5th Cir. 1968) 393 F.2d 6; *Kerr v. Dutton* (2d Cir. 1968) 393 F.2d 79; *Sciortino v. Zampano* (3d Cir. 1969) 358 F.2d 132; *Rivera v. Gov't of the Virgin Islands* (4th Cir. 1967) 375 F.2d 988; *Barber v. U.S.* (6th Cir. 1944) 142 F.2d

805; *U.S. v. Luxenberg* (7th Cir. 1967) 374 F.2d 805; *Weber v. Ragen* (8th Cir. 1949) 176 F.2d 579; *U.S. v. Gross* (9th Cir. 1969) 416 F.2d 1205; *Austin v. U.S.* (10th Cir. 1969) 408 F.2d 808 and *Swingle v. U.S.* (D.C. Cir. 1968) 389 F.2d 220. In finding these cases not controlling the lower court sought to distinguish them on the basis that the issue in each of them was the validity of the trial as affected by lack of a preliminary hearing and not the validity of pre-trial detention as such. *Ocampo* and *Beck*, supra, are contrary to this position and should have been controlling authority.

The important question of federal constitutionality decided below and the conflicts it creates with prior decisions of this Court, the decisions of other courts of appeal and with applicable Florida law justify the grant of certiorari to review the judgment below.

2. The Decision Below Raises A Significant Comity Question And The Court Of Appeals Erred In Upholding The United States District Court's Interference In A State Criminal Proceeding.

The court of appeals below held that reasons of comity do not bar this suit. Quoting from its earlier decision in *Morgan v. Wofford* (5th Cir. 1972) 472 F.2d 822 the court reiterated that abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) "was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred." (App. 8).

In affirming the declaratory and injunctive relief granted by the District Court, the Court of Appeals has

caused the very federal-state court frictions warned about in the concurring opinion in its decision in *Le Flore v. Robinson* (5th Cir. 1971) 446 F.2d 715, 719.

Due process does not compel the granting of a preliminary hearing. There was, accordingly, no basis for the District Court's interference in the criminal justice system in Dade County, Florida. As this Court said in *Younger*, supra, at 401 U.S. 44:

> "This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism . . .'"

It is submitted that the extraordinary circumstances necessary before the comity rule as heretofore espoused by this Court, can be overcome, were not present in the instant case below.

By virtue of the decision of the Court of Appeals below upholding the interference by the District Court into a Dade County, State of Florida criminal proceeding, a grave question of comity has been created.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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September 7, 1973

CERTIFICATE OF SERVICE

I, LEONARD R. MELLON, Counsel for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of September, 1973, I served three copies of the Petition for Writ of Certiorari on Bruce Rogow, Esquire, 733 City National Bank Building, Miami, Florida, and Phillip A. Hubbart, Esquire, Counsel for Respondents, and Peter L. Nimkoff, Esquire, Suite 607, Ainsley Building, 14 N.E. First Avenue, Miami, Florida, and Lewis Jepeway, Jr., Esquire, 101 E. Flagler Street, Miami, Florida, by first class mail in a duly addressed envelope with postage prepaid.

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APPENDIX

APPENDIX

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1585

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellees,

THOMAS TURNER and GARY FAULK, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Intervenors,

versus

JAMES RAINWATER, MORTON S. PERRY, SIDNEY SEGALL, Judges, Etc., ET AL,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

(August 15, 1973)

Before BROWN, Chief Judge, TUTTLE and INGRAHAM, Circuit Judges.

TUTTLE, Circuit Judge: We review here a District Court's holding that each Dade County, Florida arrestee held for trial upon an information filed by the state attorney is entitled by the Fourth and Fourteenth Amend-

ments to an expeditious hearing before a judicial officer on the question of probable cause for arrest.[1] To implement this holding, the court later adopted a plan submitted by Sheriff E. Wilson Purdy (hereinafter the Purdy Plan), which required, inter alia, that persons arrested with or without warrants in Dade County, be accorded expeditious preliminary hearings before a magistrate and that those not accorded such hearings be released immediately.[2] Implementation of the Purdy Plan was stayed by this court's order of March 31, 1972, pending appeal, during which time Dade County's judiciary moved voluntarily to establish its own plan for providing preliminary hearings. Following oral argument, on October 18, 1972, we vacated the stay order, directed the District Court to make specific findings on the constitutional deficiencies, if any, of the then-current preliminary hearings practices, and authorized implementation of the Purdy Plan.

On December 6, 1972, the Florida Supreme Court issued its Amended Rules of Criminal Procedure. These rules, which took effect February 1, 1973, provide for a committing magistrate system. The differences between the Purdy Plan and these Amended Rules provided the focus for the District Court's findings pursuant to our order, which were filed on March 12, 1973.

In light of the aforementioned intervening developments, we must resolve the following questions: (1) Should the District Court have abstained from ruling on the constitutionality of Dade County's lack of preliminary hearings in cases proceeded upon by information filed by

[1]Pugh v. Rainwater, 332 F.Supp. 1107 (S.D. Fla. 1971).

[2]Pugh v. Rainwater, 336 F.Supp. 490 (S.D. Fla. 1972).

the state attorney? (2) Do arrestees prosecuted upon informations certifying probable cause for arrest by the state attorney have a constitutional right to preliminary hearings before a magistrate? and (3) In what respects, if any, are the Amended Rules constitutionally deficient in their provisions for preliminary hearings?

I. Background

Persons arrested for felonies and most misdemeanors in Dade County, Florida are routinely brought to the Metropolitan Dade County Jail. Aside from capital cases, which must be tried on indictment by a grand jury, all other criminal cases in Florida may be commenced by "information filed by the prosecuting attorney under oath." Florida Statutes §904.01. Although preliminary hearings on probable cause for arrest with or without warrant are mandated by statute,[1] the Florida judiciary has consistently held that such hearings are not required where the state prosecutes by filing an information cer-

[1]F.S. 901.06 "Duty of officer after arresting with warrant. — When the arrest by virtue of a warrant occurs in the county where the alleged offense was committed and where the warrant was issued, *the officer making the arrest shall without unnecessary delay take the person arrested before a magistrate* who issued the warrant or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county."

F.S. 901.23. "Duty of officer after arrest without warrant. — An *officer who has arrested a person without a warrant, shall without unnecessary delay take the person arrested before* the nearest or most accessible *magistrate* in the county in which the arrest occurs, having jurisdiction and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county." (Emphasis added).

tifying probable cause for arrest.[4] Though the Florida Supreme Court has not been insensitive to the constitutional ramifications of incarceration without any preliminary probable cause hearing, it has declined to hold these practices unconstitutional or to fashion relief for arrestees held upon informations.[5] Amended Rule 3.131, which provides for a right to a preliminary hearing on any felony charge "*unless charged in an information* or indictment," (Emphasis added), preserves the previous practice of permitting the state attorney's certification to obviate the need for a preliminary hearing.

Criminal actions in Dade County, therefore, often proceed upon information sworn to by the state attorney either before or after arrest without any judicial scrutiny prior to arraignment.[6] If unable or unwilling to post bail, arrestees remain in jail at least until arraignment. This incarceration may last as long as 30 days,[7] and at least

[4]Bradley v. State, 265 So.2d 533 (Fla. 1972), cert. denied, 41 L.W. 3524; Anderson v. State, 241 So.2d 390 (Fla. 1970); Sangaree v. Hamlin, 235 So.2d 729 (Fla. 1970); State v. Hernandez, 217 So.2d 109 (Fla. 1968); Palmieri v. State, 198 So.2d 633 (Fla. 1967); Montgomery v. State, 176 So.2d 331 (Fla. 1965); Baugus v. State, 141 So.2d 264 (Fla. 1962).

[5]State ex rel. Carty v. Purdy, 240 So.2d 480 (Fla. 1970); Milton v. Cochran, 147 So.2d 137 (Fla. 1962).

[6]F.S. 908.01. "Arraignment of defendant: how made. — When an indictment has been found or an information filed against a person he shall, before he is put on trial for the offense charged, be arraigned by having the charge stated to him by the prosecuting attorney in open court and by being called upon to plead thereto. If the defendant so demands before he pleads, the indictment or information shall be read to him by the prosecuting attorney. An entry of the arraignment shall be made of record."

[7]The district court found:

"The state attorney, between January 1, 1970, and March 31, 1971, decided not to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these 'no actions' resulted from arrests on charges lacking sufficient evidence to justify the filing of an information." 332 F.Supp. at 1110.

Moreover, nearly one-fifth of the total number of cases disposed of by the state attorney in 1970 (1,565 out of 7,856) were acquittals. The court noted that the average delay period of ten to fifteen days between arrest and arraignment caused incarceration of many defendants subsequently acquitted and unnecessary expenditure of tax dollars to maintain Dade County's jails. The practical effect of prompt judicial probable cause hearings the court surmised, would be a lessening of both human misery and the tax burden because a judge's finding of no probable cause would cause dismissal of spurious prosecutions forthwith.

three days must pass before an information is filed against an arrestee and the case is calendared. During this period, the defendant sees no judicial officer other than the bail judge. Arraignment is the first opportunity for a magistrate to inspect the state attorney's information setting forth the cause upon which the defendant was arrested.[8]

The plaintiffs in this action, charged with various offenses under Florida law,[9] filed a class action in the federal court on behalf of themselves and all other Dade

[8]For purposes of this appeal, we assume that because Florida Statutes §906.06 requires the state attorney to state the offense on the information form and §906.07 says that "the court, on motion, may order the prosecuting attorney to furnish a bill of particulars," the defendant could challenge the information for failure to show sufficient probable cause upon which to continue the prosecution. Otherwise, the trial itself would present the first such opportunity for a probable cause challenge before a judicial officer. While bail hearings apparently are afforded even where the state prosecutes by information, there is no showing on this record that these hearings have ever been utilized to require the State Attorney to show probable cause for arresting as well as the reasons for setting bail at a particular level or for denying bail altogether.

[9]Plaintiff Robert Pugh was charged with robbery, a felony which was and is punishable by life imprisonment under Florida law. Plaintiff Nathaniel Henderson was charged with assault and battery, a misdemeanor under Florida law.

County arrestees detained solely upon direct informations in which the state attorney certified probable cause for arrest and detention. They alleged that their pre-trial detention was in violation of the Constitution, and sought declaratory and injunctive relief entitling them to preliminary hearings.

II. Abstention

Fully cognizant that "A federal lawsuit to stop a prosecution in a state court is a serious matter." *Younger v. Harris*, 401 U.S. 37 at 42 (1971), we nevertheless find that the plaintiffs' claim is not barred by considerations of federal-state comity.

This suit, a class action by arrestees contesting the quality of their present detention pending trial, sought no relief which would impede pending or future prosecutions on various charges in the state courts of Florida. Rather, while accepting that the state courts were the proper forum for consummation of criminal proceedings against them, the plaintiffs argued that the State was nevertheless obligated to submit them to preliminary probable cause hearings.

This court has declined to issue declaratory or injunctive relief interfering with pending or future state court prosecutions, *Becker v. Thompson*, 459 F.2d 919 (1972), cert. granted, sub nom *Steffel v. Thompson*, 41 L.W. 3462, unless the state statute under which the plaintiffs were being prosecuted was allegedly unconstitutional on its face, *Jones v. Wade and Dyson*, No. 72-1481, decided May 30, 1973. However, we have not declined to adjudicate federal questions properly presented merely be-

cause resolution of these questions would affect state procedures for handling criminal cases. Where, as here, the relief sought is not "against any pending or future court proceedings *as such*." *Fuentes v. Shevin*, 407 U.S. 67 at 71, n. 3, (1971), (Emphasis added), *Younger* is inapplicable.

The relief sought by these plaintiffs was not against any state prosecution *as such*, but only against the state's practice of considering the state attorney a sufficient judge of probable cause to hold arrestees until arraignment or trial. Simply declaring that the plaintiffs were entitled to pre-trial procedural rights, the District Court said that the plaintiffs should "immediately be given a preliminary hearing to determine probable cause by a committing magistrate *unless their cases have been otherwise concluded*." 332 F.Supp. at 1115, (Emphasis added). By recognizing that some plaintiffs' cases might have been concluded, the Court demonstrated that its declaration of pre-trial rights was not to impede the plaintiffs' prosecutions.

Not every unconstitutional pre-trial procedure, of course, will entitle a state court defendant to relief in federal court. For example, an unconstitutional search and seizure does not entitle the state court defendant to any injunction, but only to have the evidence excluded when presented in state court. *Mapp v. Ohio*, 367 U.S. 643 (1961). On the other hand, when a plaintiff who happens also to be a defendant in a simultaneous state court proceeding seeks to challenge an aspect of the criminal justice system which adversely affects him but which *cannot* be vindicated in the state court trial, comity is no bar to his challenge.

If these plaintiffs were barred by *Younger* from this forum, what relief might they obtain in their state court trials? Since their pre-trial incarceration would have ended as of the time of trial, no remedy would exist. Their claims to pre-trial preliminary hearings would be mooted by conviction or exoneration.

Plaintiffs' due process claim is closely analogous to that made in *Morgan v. Wofford*, 472 F.2d 822 (5th Cir. 1972). In *Morgan*, we held that *Younger* did not bar a claim by a probationer who had been afforded no hearing to ascertain the amount of restitution he owed the victim of his crime. We said:

> "Abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1970) was never intended where there is no possible state proceeding through which appellant may raise his constitutional objections to a state proceeding which has already occurred . . . . we have never intimated that abstention is appropriate where there is no state court prosecution to be interfered with and where the plaintiff seeking relief in federal court has no alternative forum in which to raise his constitutional claim." Id. at 826.

In *Morgan*, the plaintiff had already been subjected to the process which we held was unconstitutional. Had these plaintiffs waited until their state criminal trials to raise their due process objections, they would have already served their periods of pre-trial detention and would be barred from any relief. *Infra*, pp. 16-17.

While the plaintiffs might have filed suit in state court for a declaratory judgment and other equitable

relief based upon the same grounds as this suit, this procedure would have required a second state court proceeding to adjudicate a federal claim not based upon the merits of the defenses to the state criminal actions. *Younger* has never been applied by our circuit to force a federal court to relinquish jurisdiction over a federal claim which could not be adjudicated in a *single* pending or future state proceeding and we decline to so apply it now.

Having held that reasons of comity do not bar this suit we need not decide whether this situation comprises an exception to *Younger*. While *Younger* said abstention is inappropriate when "great and immediate irreparable injury is threatened" Id. at 46, and even temporary unconstitutional deprivations of liberty may be such injuries, *Sweeton v. Sneddon*, 324 F.Supp. 1094 (1971), *Morgan v. Wofford*, *supra*, at 826, we need not decide whether incarceration without a preliminary hearing is an injury requiring federal intervention where *Younger* would otherwise bar our jurisdiction. Also, we need not decide whether Florida's state court decisions, cited *supra*, so clearly show that under no circumstances will the state courts accord a constitutional right to a preliminary hearing that it would have been futile to require petitioners to seek redress in the state court system.

III. Probable Cause Hearings

The central issue in this case is whether the Fourth[10] and Fourteenth[11] Amendments require that arrestees held

[10] "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

[11] ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

for trial upon informations filed by the state attorney must be afforded preliminary hearings before a judicial officer without unnecessary delay.[12] More precisely, in the face of our numerous decisions holding that lack of such preliminary hearings will not vitiate a conviction,[13] are the plaintiff arrestees, nonetheless, entitled to a judgment declaring that due process necessitates a probable cause preliminary hearing before a magistrate when the state attorney prosecutes presently-confined arrestees by filing an information?

In *Hurtado v. California*, 110 U.S. 516 (1884), the Supreme Court rejected the proposition that due process under the Fourteenth Amendment requires state criminal prosecutions to be initiated via grand jury indictment. It said:

> "We are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, *after examination and commitment by a magistrate, certifying to the probable guilt of the defendant*, with the right on his part to the aid of counsel, and to the

[12]Pre-arraignment incarceration may be subdivided into two classes: those who are eventually proceeded against by the state, either by information or indictment, and those who are released upon a finding by the state attorney that insufficient evidence for continuation of the prosecution exists. Though the class of plaintiffs here includes only those against whom the state attorney proceeds by information, we do not lightly dismiss the detention of a minimum of 1,165 defendants against whom charges are subsequently dropped. As a practical matter, the relief granted by the district court, by affording probable cause hearings after arrest to all arrestees, benefits also those against whom charges are not pressed.

[13]See, e.g. *Buchannon v. Wainwright*, 5th Cir. Slip Op. No. 72-3590 (Mar. 9, 1973); *Jackson v. Smith*, 435 F.2d 1284 (5th Cir. 1970); *Scarbrough v. Dutton*, 393 F.2d 6 5th Cir. 1968).

> cross-examination of the witnesses produced for the prosecution, is not due process of law." Id. at 538. (Emphasis added.)

Since the lack of independent judicial determination of probable cause under the Dade County information system is precisely the infirmity alleged by the appellees, *Hurtado* is of relevance only because it is the cornerstone on which later decisions were built.

Lem Woon v. Oregon, 229 U.S. 586 (1913) extended *Hurtado*, allowing the state to proceed by information where

> "The constitution and laws of Oregon . . . did not require any examination by a magistrate, as a condition precedent to the institution of a prosecution by an information filed by the district attorney, nor require any verification other than his official oath." Id. at 587.

The Court refused to distinguish *Hurtado* on the ground that Oregon had not required the information to be *preceded* by a magistrate's preliminary examination and said that the opportunity for a judicial examination "*prior to* the formal accusation by the district attorney" Id. at 590 (Emphasis added), is not obligatory upon the states. Whether or not it is reasonable to infer that there is also no necessity for a *subsequent* judicial finding of probable cause without unnecessary delay is the precise issue in this case.

In *Ocampo v. United States*, 234 U.S. 91 (1914), the defendants had moved to vacate an order of arrest upon the ground that it was made

> "without any tribunal, magistrate, or other competent authority *having first* determined that the alleged crime had been committed, and that there was probable cause to believe the defendants guilty of it." Id. at 93 (Emphasis added).

Though *Ocampo* decided the narrow issue of the necessity for investigation by a judicial officer *(before arrest)*, this dictum is broad enough to encompass the instant situation.[14]

> "It is insisted that the finding of probable cause is a judicial act, and cannot properly be delegated to a prosecuting attorney. We think, however, that it is erroneous to regard this function, as performed by committing magistrates generally . . . as being judicial in the proper sense. A finding that there is no probable cause is not equivalent to an acquittal, but only entitles the accused to his liberty for the present, leaving him subject to rearrest . . . since . . . the same act . . . does not prescribe how 'probable cause' shall be determined, it is, in our opinion, as permissable for the local legislature to confide this duty to a prosecuting officer as to entrust it to a justice of the peace." Id. at 100-101.

There is a significant difference between the *Hurtado*, *Lem Woon*, and *Ocampo* decisions and our case. Probable cause hearings *prior* to arrest place a heavy burden upon

[14] *Beck v. Washington*, 369 U.S. 541 (1962), which notes that since *Hurtado* prosecutions have often proceeded on informations filed by prosecutors without prior probable cause hearings, adds nothing to *Ocampo*.

the State. *After* arrest, but before arraignment, an entirely different situation prevails. Where the State already has the defendant in custody it is not in jeopardy of losing him before a magistrate can rule on probable cause. It is only prejudiced if the magistrate finds there was no probable cause for believing the defendant committed the crime, in which case the prosecution ought not to proceed anyway. We therefore fact [sic] squarely the plaintiffs' contention that Florida's denial of a probable cause hearing after arrest but before arraignment is constitutionally impermissible because the prosecuting attorney, who certifies the existence or non-existence of probable cause, is not sufficiently detached to make this decision.

In *McNabb v. United States*, 318 U.S. 332 (1942), after pointing out that "legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states," Id. at 342, the Court said that:

> "The purpose of this impressively pervasive requirment of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be en-

trusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. *Legislation* such as this, *requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard* — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." Id. at 343-344. (Emphasis added).

Recently, the Supreme Court has held on several occasions that judicial detachment was constitutionally mandated. *Coolidge v. New Hampshire*, 403 U.S. 443 (1970), held that the Fourth Amendment requires a neutral and detached magistrate to authorize the search and seizure of property by the police. Though New Hampshire argued that the Attorney General, who was authorized to issue warrants under state law, did in fact act as a neutral and detached magistrate, the Court responded:

". . . there could hardly be a more appropriate setting than this for a *per se* rule of disqualification rather than a case-by-case evaluation of all the circumstances. Without disrespect to the state law enforcement agent here involved, the whole point of the basic rule . . . is that prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations — the 'competitive enterprise' that must rightly engage their single-minded attention." Id. at 450.

In summary, the Court added:

"We find no escape from the conclusion that the seizure and search . . . cannot constitutionally rest upon the warrant issued by the state official who was the chief investigator and prosecutor in this case. Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all." Id. at 453.

The Fourth Amendment's prohibition against warrantless searches and seizures has been applied in two arrest situations closely analogous to the one at bar. *Morrissey v. Brewer*, 408 U.S. 471 (1971) required that a parolee, after arrest, could be returned to custody for violation of parole conditions only after a hearing on probable cause before someone not directly involved. The Court emphasized that

". . . due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser v. Reed*, 115 U.S. App. D.C. 254, 318 F.2d 225 (1963). Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe

that the arrested parolee has committed acts that would constitute a violation of parole conditions. Cf. *Goldberg v. Kelly*, 397 U.S., at 267-271.

"In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case" Id. at 485.

In *Shadwick v. Tampa*, 407 U.S. 345 (1971), the city authorized the issuance of arrest warrants by clerks of the Municipal Court. The petitioner challenged these warrants on the ground that the clerks were not neutral and detached magistrates for purposes of the Fourth Amendment as incorporated into the due process clause of the Fourteenth Amendment. The Court, accepting the proposition that the Constitution mandates that arrest warrants be issued only by "judicial officers" or "magistrates," proceeded to hold that the clerks were judicial officers. In so holding, the Court explained:

"The warrant traditionally has represented an independent assurance that a search and *arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest* or search. This Court long has insisted that inferences of probable cause be drawn by 'a neutral and detached magistrate instead of

being judged by the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States, supra*, at 14; *Giordenello v. United States, supra*, at 486. In *Coolidge v. New Hampshire, supra*, the Court last Term voided a search warrant issued by the state attorney general 'who was actively in charge of the investigation and later was to be chief prosecutor at the trial.' Id., at 450. If, on the other hand, detachment and capacity do conjoin, the magistrate has satisfied the Fourth Amendment's purpose." Id., at 350 (Emphasis added).

Morrissey and *Shadwick* illustrate that probable cause for arrests may not always be determined by a prosecuting attorney, notwithstanding the dictum of *Ocampo*. Magistrates or other officials having the detachment of magistrates have been required to find probable cause for returning a parolee to custody and for issuing arrest warrants. Must such detachment be present in a hearing of probable cause where the state holds an arrestee upon an information sworn to by the state attorney? Because this court has said that an arrestee proceeded against by information has no constitutional right to a preliminary hearing, *Buchannon v. Wainwright, supra; Jackson v. Smith, supra; Scarbrough v. Dutton, supra*, we turn now to these decisions.

The opinion of the trial court thoroughly explores the dispositive distinction between the instant case and prior decisions discounting the existence of a due process right to a preliminary hearing:

"Numerous opinions have been cited in which this circuit has held there is no due process right to a preliminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the pre-trial detention itself. In *Scarbrough v. Dutton*, 393 F.2d 6 (5th Cir. 1968), the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, 'The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights which would vitiate the subsequent conviction.' 393 F.2d at 7 (Emphasis added). See also; *Murphy v. Beto*, 416 F.2d 98 (5 Cir. 1969); *McCoy v. Wainwright*, 396 F.2d 818 (5 Cir. 1968); *King v. Wainwright*, 368 F.2d 57 (5 Cir. 1966); *Worts v. Dutton*, 395 F.2d 241 (5 Cir. 1968); *Kerr v. Dutton*, 395 F.2d 79 (5 Cir. 1968); cf. *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961).

"In *Anderson v. Nosser*, 438 F.2d 184 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pretrial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in *Anderson* occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in *Anderson*, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the *Anderson* Court itself considered the case to come within the post conviction situation is apparent from its reliance upon *Julyk v. United States*, 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

"The instant case differs from the foregoing in that this Court is asked to determine the validity of a present confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike *Anderson*, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutorial system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent." 322 F.Supp. at 1112-1113.

The distinction between a pre-trial declaration of a right to a hearing and a post-conviction appeal for reversal on the basis of the absence of such hearing is a pragmatic and sensible distinction. Moreover, it is simple in its application, as *Richardson v. Gerstein*, 336 F.Supp. 67 (1972), illustrates. In *Richardson*, the same district court which granted relief in this case refused to grant relief to plaintiffs who had been validly convicted and were seeking to shorten their sentences, rather than to question the quality of their pretrial detention.

While a magistrate might well arrive at the same decision as to probable cause as the state attorney, we hold that due process abhors even the appearance of such entanglement between the prosecutorial and judicial functions as exists under the Florida information prosecution system. Incarceration of an untried defendant for up to a month without any scrutiny by a judicial officer of the basis for this incarceration is far more odious to a sense of justice than the temporary deprivation of property without a hearing. Yet the Supreme Court has repeatedly held that such deprivations of property are impermissible. *Fuentes v. Shevin*, 407 U.S. 67 (1971); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

This practice may substantially prejudice defendants in preparation of their cases and result in the incarceration of defendants against whom the State dismisses charges. No countervailing state interest is fulfilled by such deprivation for, as the District Court predicted in its opinion,

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their cases had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community." 332 F.Supp at 1114.

In the intervening months between issuance of our order vacating the stay of the interim panel of this court and the District Court's findings as to the interim practices followed, evidence has accumulated which fully supports this prediction. Judge Tanksley, Chief Judge of the Magistrate Division of Florida's Eleventh Judicial Circuit, for example, estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County.

We therefore affirm the judgment of the district court requiring the State of Florida to immediately give the plaintiffs a preliminary hearing to determine probable cause for their arrests unless their cases have been otherwise concluded.

IV. REMEDIES: The Amended Rules and The Purdy Plan

Subsequent to oral argument in this case, many controversial provisions of the district court's adoption of the Purdy Plan have become moot due to implementation of similar provisions for providing preliminary hearings under Florida's Amended Rules of Criminal Procedure. The parties are agreed, however, that the Purdy Plan went beyond the Amended Rules in certain respects. To the import of these remaining divergencies we now direct our attention.

a) *Time between arrest and preliminary hearing.*

In the district court's Purdy Plan order, it was held:

> "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be

> held within four (4) days [of initial appearance]." 336 F.Supp. at 492.

The initial appearance under the Purdy Plan had to be within 3 hours of arrest. The new rules provide for a preliminary hearing within 72 hours, or 3 days, of initial appearance,[15] and such initial appearance is required within 24 hours of arrest. However, Rule 3.040 of the Amended Rules contains this proviso:

> "When the period of time prescribed or allowed [under all rules other than 3.130] shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus appellants argue that a six day lapse is frequently allowed between arrest and preliminary hearing under the Amended Rules. This time lapse, they say, is beyond the constitutionally tolerable maximum and therefore denies them due process of law under the Fourteenth Amendment.

Whether a four-day lapse is constitutional while a six-day lapse is not would be a difficult factual question. We need not, however, face this nice question, because no appellant argues that he has been accorded a preliminary hearing more than four but less than six days after his arrest.

However, because the District Court's Purdy Plan order established an across-the-board four-day maximum lapse period which conflicts with Rule 3.040, we cannot

[15]Rule 3.131(b), Florida Rules of Criminal Procedure.

allow both the Plan and the Rule to coexist in their inconsistency. We therefore vacate that portion of the Purdy Plan order which set a four-day maximum period on the ground that it was unnecessary to the disposition of this case.

b) *Exclusion of misdemeanants.*

The appellants argue that since Rule 3.131(a) authorizes hearings before a neutral and detached judicial officer only "on any felony charge" the rule violates the Equal Protection Clause by denying such hearings to misdemeanants. We agree that this proviso to the Rule is constitutionally impermissible.

Plaintiff Henderson, who was charged with the misdemeanor of assault and battery under Florida Law and who had been incarcerated prior to trial without the benefit of a probable cause hearing, has standing to raise this point on behalf of himself and other incarcerated misdemeanants. Moreover, the proviso of the statute is so clear that we need not certify the question whether Rule 3.131(a) was intended to provide for preliminary hearings for misdemeanants. Clearly, it was not so intended.

No sufficient justification exists for disallowing preliminary hearings for misdemeanants. The plight of an accused misdemeanant incarcerated without a hearing is just as serious as that of an accused felon, and there is no merit to either of the two "compelling governmental interests" which the State contends are served by not prescribing hearings for misdemeanants.

First, the State argues it is concerned lest the same magistrate determining probable cause in a misdemeanor case try that very case, denying the defendant a fair trial. The answer to this is not the denial of preliminary hearings, but the development of a system whereby judges are rotated to prevent such overlap. Indeed, the Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit has already testified that preliminary hearings and misdemeanor trials are currently conducted by separate panels of judges in Dade County.

Second, it is argued that the State cannot bear the expense of providing preliminary hearings for misdemeanants. The trial court found that

> "while more magistrates as well as courtroom facilities may be needed as a result of our order, and that costs may increase in the short run, it will not be a significant increase."

This finding was amply supported. The number of misdemeanor cases involving no pretrial incarceration and requiring no preliminary hearings comprised the bulk of all misdemeanors. Moreover, experience from the felony-hearing system showed a reduction in felony caseloads and a savings to the taxpayers of the county.[16]

Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that misdemeanants threatened with potential incarceration must be afforded counsel at State expense, provides guidance in this case. In *Argersinger*, Mr. Justice Douglas, speaking for the majority of the Court, noted

[16]See text *supra* at tp. 22.

that many rights required under the due process clause of the Fourteenth Amendment[17] apply irrespective of the classification of the charge pending against the defendant who faces potential incarceration. We believe the right to a preliminary probable cause hearing before a defendant is subjected to pretrial incarceration is as essential to due process as those rights listed in and extended by *Argersinger*. Therefore, except where misdemeanants are out on bond or are charged with violating ordinances carrying no possibility of pre-trial incarceration,[18] they must be accorded preliminary hearings. In short, the offense charged is irrelevant to the man incarcerated prior to trial; he must, therefore, be afforded a preliminary hearing regardless of his status as an accused misdemeanant or an accused felon.

c) *Delayed hearings in capital or life imprisonment cases.*

Rule 3.131(b) of the Florida Rules of Criminal Procedure provides:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. *In all capital offenses and*

[17]Included in this listing were rights to a "public trial," to be informed of the nature and cause of the accusation, to confront one's accusors, and to have compulsory process for obtaining witnesses in one's favor.

[18]These offenses, which probably include those referred to by the district court as "prosecutions of the barking dog variety," may reasonably be screened by the State Attorney alone at the request of complaining citizens because the defendant in such cases is not confined prior to trial.

> *offenses punishable by life imprisonment* and in all cases where the defendant is not in custody, *the preliminary hearing shall be held within seven days of the time of defendant's first appearance.*"

Though we know of no Florida decision interpreting whether "within seven days" is covered by the Rule 3.040 proviso, *supra*,[19] we need not attempt to divine how these rules would dovetail since we are convinced that even in [sic] Rule 3.131(b) is outside the time limit set in Rule 3.040, any preliminary hearing delay which discriminates against those accused of capital or life imprisonment offenses violates the Equal Protection Clause.

Under Rule 3.131(b), Florida has classified these types of offenses in a manner which disadvantages the party charged with the more serious offense even though the defendant has not yet had any opportunity to contest the basis for his arrest. In order to justify this discrimination, Florida must make some showing that there are factors requiring different treatment of these offenses from the treatment given to other felonies. While four days may be a reasonable time, as the district court found, to allow witnesses to be summoned and other mechanical tasks to be performed, Florida has made absolutely no showing that it requires more time to handle the mechanics of a preliminary hearing where life or capital offenses are involved than in other felony or misdemeanor cases. In the absence of such showing, we find that Rule 3.131(b) is inconsistent with the demands of the Equal Protection

[19] If this were the case, a lapse of 10 calendar days between arrest and preliminary hearing would be permitted.

Clause insofar as it delays the preliminary hearings of persons in Robert Pugh's position.[20]

d) *Sanctions against the State in the event of noncompliance.*

To ensure prompt implementation of its requirement to probable cause preliminary hearings, the district court included the following paragraph in its Purdy Plan order:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge." 336 F.Supp. at 492.

> "19. . . . (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal." 366 F.Supp. at 493.

[20] Pugh was charged with robbery, a crime punishable by life imprisonment in Florida. See fn. 9.

These paragraphs were at the time considered necessary by the court as a means for overcoming Florida's longstanding practice of denying preliminary hearings to criminal defendants.

Since Florida's practices have presumably been altered drastically with the adoption of the Amended Rules and preliminary hearings should now be an accepted procedure throughout the State, we vacate these two provisions in the Purdy Plan. The factors involved in the imposition of sanctions having changed significantly since the Purdy Plan was issued, the District Court's exercise of equitable power should be modified to account for these changes. At least until such time as experience shows that Dade County's judiciary and constabulary are not following the Rules of Criminal Procedure as modified to extend the right of preliminary hearings in accordance with this opinion, we will not presume that such onerous sanctions are necessary to insure compliance with the law of this circuit.

The judgment of the District Court is AFFIRMED in part and VACATED in part.

[TITLE OMITTED]

(Filed October 1, 1971)

OPINION AND FINAL JUDGMENT

Plaintiffs Robert Pugh and Nathaniel Henderson brought this class action, in which plaintiffs Thomas Turner and Gary Faulk have intervened, seeking relief for the alleged deprivation of their rights as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States. Jurisdiction is founded upon 28 U.S.C. 1343 (3), (4) and grows out of a Constitutional attack (42 U.S.C. 1983) upon the procedure whereby plaintiffs were incarcerated, upon information filed by the state attorney, and held for trial in Dade County, Florida, without review by a committing magistrate of the probable cause for their arrest.

The defendants herein are sued in their official capacities (sheriff, police chiefs, state attorney, justices of the peace and judges of small claims courts of Dade County and several of its municipalities) as individuals charged with the responsibility of administering the system under which plaintiffs were incarcerated.

The plaintiffs contend that they have been deprived of a Constitutional right to a preliminary hearing before a judicial officer to determine whether there is probable cause that they committed the offenses with which they are charged.

Under the present procedure the state attorney (or one of his assistants) considers the reports submitted by police officers of the results of their investigations and thereafter files a direct information and issues a capias for arrest of the individual charged with the offense The person may be already in jail or is then arrested and waits in jail until either he is released on bond or is tried. There is no review by a judicial officer as to the probable cause for the arrest and detention of a person charged by the state attorney in a direct information.

Plaintiffs further allege they have been denied their constitutionally protected right to equal protection of the law in that in certain instances the police will process cases through the offices of the justices of the peace instead of going to the office of the state attorney as was done herein. A justice of the peace conducts a preliminary hearing for probable cause whereas the state attorney does not. It is contended that the unfettered discretion of the police in deciding whether to file criminal charges with the justice of the peace or the state attorney, results in an arbitrary and unreasonable creation of two classes of arrested persons, those who are afforded a preliminary hearing and those who are not.

Lastly plaintiffs contend that the setting of a monetary bail bond as a condition for the release of persons financially unable to post the bond creates two classes of arrested persons and discriminates against poor persons, thereby violating their right of equal protection of the law. Plaintiffs Henderson, Turner and Faulk allege they remain imprisoned because of their impoverished financial conditions.

In the case of plaintiff Pugh no bond has been set pursuant to F.S.A. Constitution, Article 1, §14 since the main pending charge is robbery, a crime punishable by life imprisonment, F.S.A. 813.011.

On May 13, 1971 the Court, upon the request of all counsel took the plaintiff's pending motions for summary judgment under advisement for the purpose of permitting the Florida Legislature an opportunity to consider pending legislation providing for the type of probable cause hearing sought herein. The Legislature adjourned without enacting the proposed statute and this case was set for final hearing. In the course of arguing their respective positions during final hearing, all counsel agree that there are no issues of fact to be resolved in this suit and that the issues can, and should, be determined as a matter of law.

Consistant [sic] with the philosophy of non-intervention in state criminal procedures the Court afforded the parties a reasonable time, subsequent to the final hearing, within which to attempt to agree upon the implementation of a system securing to all persons the protection of judicial review of the probable cause for arrest. This proved fruitless. The time of restraint is past and the Court has no alternative except to act.

UNDISPUTED FACTS

A person may be charged with a crime in Dade County, Florida, in one of five ways:

(1) A police officer witnesses the commission of a crime, places the accused under arrest and

takes him to jail. Sometime between 24 hours and two weeks later the arresting officer files a sworn affidavit with the office of the state attorney who, then files a direct information and issues a capias against the defendant.

(2) A police officer conducts an investigation of an alleged criminal offense, decides he has sufficient evidence to arrest, and places the defendant in jail. The arresting officer then goes to the state attorney with his affidavit and a direct information is filed against the defendant by the state attorney.

(3) A police officer conducts an investigation but takes the case to the state attorney before making the arrest and, after issuance of the direct information, arrests the defendant and places him in jail.

(4) A police officer conducts an investigation, presents the matter by affidavit to a justice of the peace, who issues a warrant for arrest and conducts a preliminary hearing to determine probable cause as to the commission of the alleged crime. The defendant is released if no probable cause is found to exist.

(5) The results of an investigation are submitted by the state attorney to the grand jury, which determines probable cause and returns an indictment to a judge. After review, the judge either issues the arrest warrant and causes the indictment to be filed or dismisses the charge.

Under the process outlined in paragraphs 1, 2, and 3 above there is no judicial determination, prior to trial of whether or not there is probable cause to believe that the particular defendant under arrest did in fact, commit the offense for which he is being held in custody. The procedures outlined in paragraphs 4 and 5 provide for a probable cause hearing, by a judicial officer, prior to trial and are not therefore under attack in this litigation.

When an accused person is informed against by the state attorney and arrested, processing of the information does not begin until the arresting officer appears before an assistant state attorney and files his affidavit of facts. In spite of the fact that officers are urged to file their affidavit with the state attorney as promptly as possible periods from twenty-four hours to more than two weeks elapse before the affidavit is filed and processing begins.

The state attorney, between January 1, 1970 and March 31, 1971, decided *not* to file direct informations in 1,165 cases in which a person had been charged or arrested as a result of police investigation. The majority of these "no actions" resulted from arrests on charges lacking sufficient evidence to justify the filing of an information.

Obviously, a judicial officer considering probable cause on a preliminary hearing would have promptly disposed of all of these cases with a tremendous saving of human misery (to all those who had been arrested on insufficient evidence) and of tax dollars (to the average citizen who is paying for the cost of a vastly overcrowded jail facility in Dade County, Florida).

Once the state attorney's office decides to file the information a period of twenty-four to seventy-two hours plus weekends is required to prepare the information for filing with the Clerk of the Criminal Court of Record. The information is then filed and set for arraignment with an average delay of ten to fifteen days from the time the arresting officer appears until the time the defendant is arraigned.*

At no time prior to trial is a defendant who is proceeded against by information afforded a hearing to determine the existence of probable cause. It is the policy of the state attorney to oppose any attempt to secure such a hearing.

JURISDICTION

Where the Federal Court is asked to pass upon the validity of state criminal procedures, the question of jurisdiction requires careful scrutiny. Defendants urge that the Federal Anti-Injunction Statute, 28 U.S.C. 2283, along with the recent Supreme Court decisions in a series of cases led by *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971), remove this cause from the Court's jurisdiction. See, *Boyle v. Landry* 400 U.S. 77, 91 S.Ct. 758, (1971); *Dyson v. Stein*, 400 U.S. 200, 91 S.Ct. 769 (1971); *Samuels v. Mackell*, 400 U.S. 66, 91 S.Ct. 674 (1971); *Perez v. Ledesma*, 400 U.S. 82, 91 S.Ct. 674 (1971); *Byrne v. Karalexis*, 400 U.S. 216, 91 S.Ct. 777 (1971).

*Although the record does not reflect the ultimate disposition of the direct information cases alone, it does appear that of the total of 7,856 cases disposed of by the state attorney in 1970, there were 198 "nolle pros", and 1,565 acquittals.

The Anti-Injunction Statute provides that "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments", 28 U.S.C. §2283. The *Younger* case rested not upon an interpretation of this statute and the exceptions thereto but upon "the national policy forbidding Federal Courts to stay or enjoin pending State Court proceedings except under special circumstances", 401 U.S. at 41.

Under *Younger, et al* as well as under the statute the relief precluded is the enjoining of a prosecution or a declaratory judgment with the same effect, *Samuels v. Mackell*, supra. Moreover, in each of the *Younger* cases the requested relief included a declaration of unconstitutionality of a state substantive criminal statute. Plaintiffs at bar ask the Court neither to declare unconstitutional a state statute nor to enjoin a prosecution, but instead pray for a declaration of procedural rights and an injunction from the continued denial thereof. This case is therefore not in conflict with either *Younger* or 28 U.S.C. §2283. Furthermore, even were the relief requested herein considered to be within *Younger*, the circumstances of this case would come within the exceptions to that principle.

Mr. Justice Black outlined in *Younger* the circumstances under which a Federal Court can enjoin a state criminal proceeding. There must be a "great and immediate" "irreparable injury" other than the "cost, anxiety, and inconvenience of having to defend against a single criminal prosecution," and the injury must be one that cannot be eliminated by the defense therein, 401 U.S. at 46,

91 S.Ct. at 751. Although *Younger* recognizes that jurisdiction would exist where a state prosecution was brought in bad faith or for harrassment, as in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), it is clear that these factors are not additional prerequisites to relief but are indicative of irreparable injury. See also *Duncan v. Perez*, No. 31089, 5 Cir. June 14, 1971. In describing the harassment present in *Dombrowski*, the Court noted that "[t]hese circumstances . . . sufficiently establish the kind of irreparable injury sufficient to justify federal intervention", 401 U.S. at 48, 91 S.Ct. at 752.

Plaintiffs at bar are challenging the validity of their imprisonment pending trial with no judicial determination of probable cause. These facts present an injury which is both great and immediate and which goes beyond cost, anxiety, and inconvenience. Furthermore, the state has consistently denied the right asserted, so that the injury is irreparable in that it cannot be eliminated either by the defense to the prosecution or by another proceeding. See *Anderson v. State*, 241 So.2d 390 (Fla. 1970); *Sangaree v. Hamlin*, 235 So.2d 729 (Fla. 1970); *Montgomery v. State*, 176 So.2d 331 (1965); *Baugus v. State*, 141 So.2d 264 (1962)*. For the reasons stated the Court finds that it has jurisdiction in this cause.

CONSTITUTIONAL QUESTIONS

The principal constitutional issue for determination is, of course, whether one who is arrested and held for trial upon an information filed by the state attorney is

*The case law cited relates only to count 1 of the complaint. Lengthy consideration of counts 11 and 111 is unnecessary in light of the holdings which follow.

entitled to a hearing before a judicial officer on the question of probable cause.

The Court is faced with a unique factual situation which does not appear to be controlled by the plethora of cases cited by counsel. Defendants rely on *Woom v. Oregon*, 229 U.S. 586, 33 S.Ct. 783 (1914) in which the Supreme Court held that an Oregon defendant who was accused by sworn complaint before a committing magistrate had no right to an examination as a condition precedent to the filing of an information by the district attorney. In *Woom* the Court was concerned with the validity of the information rather than the pre-trial detention. Furthermore, that case did not consider a procedure resulting in lengthy detention after arrest where neither a sworn complaint nor an information had been filed.

It is significant that the *Woom* case relied on *Hurtado v. California*, 110 U.S. 516, 4 C. Ct [sic] 111 (1884) holding that a grand jury indictment was not a prerequisite to a felony prosecution, and stating:

> . . . we are unable to say that the substitution for a presentment or indictment by a grand jury *of the proceeding by information after examination and commitment by a magistrate, certifying to the probable quilt* [sic] *of the defendant* with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law." (emphasis added) 110 U.S. at 537, 4 S.Ct. at 122.

Numerous opinions have been cited in which this circuit has held there is no due process right to a pre-

liminary hearing. The issue in each of those cases however, was the validity of the trial as affected by the absence of a preliminary hearing and not the validity of the pre-trial detention itself. In *Scarborough v. Dutton*, 393 F.2d 6 (5 Cir. 1968) the Court, upholding a conviction where the defendant had been incarcerated for seven months without a preliminary hearing, stated, "The failure to hold a preliminary hearing, without more, does not amount to a violation of constitutional rights *which would vitiate the subsequent conviction*". 393 F.2d at 7 (emphasis added). *See also: Murphy v. Beto*, 416 F.2d 98 (5 Cir. 1969); *McCoy v. Wainwright*, 396 F.2d 818 (5 Cir. 1968); *King v. Wainwright*, 368 F.2d 57 (5 Cir. 1966); *Worts v. Dutton*, 395 F.2d 341 (5 Cir. 1968); *Kerr v. Dutton*, 395 F.2d 79 (1968); cf. *Hamilton v. Alabama*, 368 U.S. 52, 82 S.Ct. 157 (1961).

In *Anderson v. Nosser*, 438 F.2d 183 (5 Cir. 1971), even though the Court did not consider the validity of a conviction, the facts were analogous to those in the foregoing post-conviction cases. In each case cited supra the pretrial detention had ceased to exist, and the trial itself being valid, there was no continuing deprivation of rights. The confinement in *Anderson* occurred over a period of two to four days with the various federal complaints being filed from three months to fourteen months after plaintiffs' release. Consequently, in *Anderson*, just as in the post conviction cases the Court was asked to grant relief from a deprivation of rights no longer in effect. That the *Anderson* Court itself considered the case to come within the post conviction situation is apparent from its reliance upon *Kulyk v. U.S.*, 414 F.2d 139 (5 Cir. 1969), and other cases, all of which turned upon the validity of a conviction, 438 F.2d at 196.

The instant case differs from the foregoing in that this Court is asked to determine the validity of a present confinement. The complaint herein was filed during plaintiffs' incarceration. Unlike *Anderson*, the confinement at bar is not an isolated event but is a recurring part of the state sanctioned prosecutional system. Unless corrected the wrong complained of will continue to infringe upon the rights of the individual plaintiffs and the class they represent.

A criminal system wherein the individual faces prolonged imprisonment upon the sole authority of the police and/or prosecutor violates the principles which underly this country's founding and which are the essence of the constitutional guarantees of freedom from unreasonable seizure and from deprivation of liberty without due process of law.

The danger inherent in a system of this kind was described by Mr. Justice Frankfurter in *McNabb v. United States:*

> [l]egislation requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states.
>
> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disre-

> gard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard — not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. 318 U.S. 332, 343-44, 63 S.Ct. 608, 614 (1943).

Over forty years ago the Florida Legislature (1939) enacted a statute requiring any officer arresting without a warrant to take the defendant before a committing magistrate *without unnecessary delay*, F.S.A. 901.23. Thus we see the requirement for a preliminary hearing is not a new innovation in the law of the State of Florida.

The Fourteenth Amendment provides that no state shall deprive any person of liberty without due process of law. The fundamental requisite of due process of law is the opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191 (1965).

It has been held that a hearing must be given *before* a drivers license and vehicle registration can be suspended, *Bell v. Burson*, 91 S.Ct. 1586 (1971); *Salkay v. Williams*, No. 30090 (5 Cir. June 22, 1971); *before* prohibiting the sale of liquor to an individual for one year, *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Cr. [sic] 507; *before* termination of welfare payments (even though a subsequent hearing was afforded), *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011 (1970); *before* garnishment of wages (even though there was a subsequent trial), *Snidash v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1920 (1969); *before* a thirty day suspension from a public school, *Williams v. Dade County School Board*, 441 F.2d 299 (5 Cir. 1971); *before* refusal of admission to public hospital staff, *Sosa v. Board of Managers*, 437 F.2d 173 (5 Cir. 1971); and *before* termination of employment on faculty, *Ferguson v. Thomas*, 430 F.2d 852 (5 Cir. 1970). It would appear beyond question that due process demands a preliminary hearing within a reasonable time after an accused has been deprived of his freedom.

In *Goldberg v. Kelly*, the Court summarized the test for providing procedural due process as follows:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss." *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647, (1951) (Frankfurter J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. 397 U.S. 254, 262-63, 90 S.Ct. 1011, 1017-18.

In this case the grievous loss is that of one's freedom and the countervailing governmental interest is that of the state in avoiding the burden of preliminary hearings. Although the state may incur additional expense in expanding its existing committing system to include hearings for direct information cases, this expense will be more than offset by the savings in jail and trial costs regarding those persons heretofore jailed and/or tried without probable cause. Moreover, these financial considerations are so grossly overbalanced by the prolonged loss of freedom by innocent persons that further comment is unnecessary.

The taxpayers of this community have labored under a near intolerable burden of the spiraling cost of combating crime. The expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community.

A preliminary hearing in direct information cases is compelled by the Fourth Amendment as well as by the Fourteenth Amendment.

The Fourth Amendment provides that "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation. . . ". It has been established that this amendment is operable upon the states via the due process clause of the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684 (1961) and that

it applies to arrest warrants as well as to search warrants. *Giordenello v. U.S.*, 357 U.S. 480, 78 S.Ct. 1245 (1958).

The existence of a Fourth Amendment right to a probable cause hearing has been recognized in two opinions of the Court of Appeals for the District of Columbia Circuit. In *Cooley v. Stone*, 134 U.S. App. D.C. 317, 414 F.2d 1213 (1969) the Court held that a juvenile in the custody of a detention home had the right to a probable cause hearing and cited approvingly the following language of the lower court:

> No person can be lawfully held in penal custody by the state without a prompt judicial determination of probable cause. The Fourth Amendment so provides and this constitutional mandate applies to juveniles as well as adults. 414 F.2d at 1213.

In *Brown v. Fauntleroy*, 442 F.2d 838 (1971) the Court found that the same right applied to a juvenile released pending trial to the custody of his mother. In that opinion the Court emphasized that the basis of the right was in the Constitution and not in the Federal Rules of Criminal Procedure. Of the fact that the accused was not in physical state custody the Court said;

> "[T]he right to be free of a seizure made without probable cause does not depend upon the character of the subsequent custody. Appellant accordingly has the right to have the validity of the seizure determined since he will be called to trial for conduct which led to the seizure." 442 F.2d at 842.

Recently the Supreme Court overturned a State Court conviction based upon evidence seized under a search warrant issued by the state attorney general who was the chief investigator and prosecutor in the case. The warrant was held to be invalid under the Fourth and Fourteenth Amendments because not issued by the "neutral and detached magistrate required by the Constitution", *Coolidge v. New Hampshire*, 400 U.S. 814, 91 S.Ct. 2022 (1971). If a prosecuting official cannot properly issue a search warrant in a case he is prosecuting, then he is a fortiori not a proper person for determining the existence of probable cause to hold an accused for trial.

The Court finds that under the Fourth and Fourteenth Amendments, arrested persons, whether or not released on bond, have the constitutional right to a judicial hearing on the question of probable cause.

Count II alleges that the system which denies a preliminary hearing to plaintiffs' class while granting a hearing to other criminal defendants is violative of the right to equal protection of the law. Because of the Court's holding that in all direct information cases the accused must be given a hearing as a right of due process and freedom from unreasonable seizure, it is unnecessary for the Court to determine whether the prior system was invalid for failure to afford equal protection of the law. *See Troy State University v. Dickey*, 402 F.2d 515 (5 Cir. 1968).

Plaintiffs contend in count III that where an accused is financially unable to post the required security for his release pending trial there exists an arbitrary and unreasonable classification based solely upon wealth in violation of the right to equal protection of the law. The record

establishes that it is the policy of defendants to set bonds sufficiently low to allow accused persons their release while assuring their subsequent appearance at trial. The severity of the crime along with the accused's ties to the community, past criminal record, and financial resources are all considered in the setting of bonds. There is no allegation that any bond in question was set in excess of that which the judicial officer deemed necessary to assure trial appearance.

In contending that they are denied release solely because of their poverty, plaintiffs ignore the other factors distinguishing them from released persons. The record shows that plaintiffs' confinement is not the result of a classification based solely upon wealth, consequently they have not been deprived of their right to equal protection of the law.

The Court recognizes the cooperative attitude of the state authorities and their desire to comply with the law. Obviously they are the individuals most qualified to develop the new procedures required by this order. It is hereby suggested that the assistance of Presiding Circuit Judge Marshall C. Wiseheart in the implementation of this this [sic] order would be helpful. It is therefore,

ORDERED and ADJUDGED:

1. That this is a valid class action brought pursuant to Rule 23(b)(2), Federal Rules of Civil Procedure, on behalf of all persons arrested in Dade County who are or will be proceeded against by direct information of the state attorney.

2. The named plaintiffs shall immediately be given a preliminary hearing to determine probable cause for their arrest by a committing magistrate unless their cases have been otherwise concluded.

3. That defendants shall, within 60 days of the date hereof, submit to the Court a plan providing for preliminary hearings before a judicial officer empowered to act as committing magistrate in all cases wherein prosecution is to be upon direct information. The preliminary hearing shall be within a reasonable time of the arrest.

4. Subsequent to final hearing certain motions for summary judgment, severance and transfer of party defendants to party plaintiff were filed. These motions be and the same are hereby denied.

5. The Court retains jurisdiction for a consideration of the plan and enforcement of the provisions of this final judgment.

DONE and ORDERED in chambers at Miami, Florida, this 12th day of October, 1971.

JAMES LAWRENCE KING

JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

cc: Counsel of Record

[TITLE OMITTED]

ORDER ADOPTING PLAN TO PROVIDE PRELIMINARY HEARINGS

(Filed Jan. 25, 1972)

In its Opinion and Final Judgment in this cause entered October 12, 1971, the Court directed defendants to submit a plan providing for preliminary hearings before a judicial officer in all criminal cases in Dade County wherein prosecution is to be upon direct information of the State Attorney. A single plan having been submitted, that being on behalf of Defendant E. Wilson Purdy, and the Court having provided all parties with the opportunity for oral argument regarding said plan, it is

ORDERED AND ADJUDGED:

I. That the aforesaid plan, as modified by the Court, shall be the official plan for implementation of the Court's final judgment, said modified plan being as follows:

1. The purpose of this plan is to provide every arrested person (hereinafter defendant) who is to be proceeded against by direct information of the State Attorney immediate access to a committing Magistrate who shall conduct a first appearance hearing for the following purposes:

(A) To advise the defendant of the charges against him; (B) To advise the defendant of his rights under the Constitution of the United States

and the Constitution of the State of Florida; (C) To appoint counsel if the defendant is indigent; (D) To set a date and time for a preliminary hearing to determine whether there is probable cause that the defendant committed the offense with which he is charged.

2. All proceedings will be conducted pursuant to Florida Statutes, the Florida Rules of Criminal Procedure and the applicable case law.

3. All arrested persons who are subject to "booking" will be booked at the Metropolitan Dade County Jail.

4. All officers who make an arrest, with or without a warrant, shall immediately take the arrested person, or where that is not feasible cause him to be taken, before a Magistrate for a first appearance hearing. Absent extreme circumstances said hearing shall take place within three (3) hours of the time the defendant is taken into custody.

5. The Chief Judge for the Eleventh Judicial Circuit in and for Dade County shall designate sufficient Judges, who will sit as a committing magistrate division.

6. A committing magistrate will be available for first appearance hearings on a twenty-four (24) hour basis seven (7) days per week.

7. All first appearance hearings will be held in the courtroom or chambers of the designated committing magistrate.

8. At the first appearance hearing the magistrate will set the time and place for a preliminary hearing to determine whether there is probable cause to hold the defendant for trial. If both the State of Florida, represented by the office of the State Attorney, and the defendant, properly represented by counsel, are prepared to proceed with the preliminary hearing, the magistrate shall immediately conduct such a hearing. If either party is not prepared for the preliminary hearing said hearing shall not be set to take place within a period of twenty-four (24) hours after the first appearance hearing unless the parties agree to a time within that period. Except in extreme circumstances the preliminary hearing will be set to take place not more than four (4) days after the first appearance hearing for all defendants who are unable to post bond and do not qualify for the Pre-Trial Release Program and not more than ten (10) days after the first appearance hearing for all other defendants.

9. A defendant may waive his right to a preliminary hearing or agree to a hearing date that is later than the time hereinabove set forth, provided that such a waiver is signed by the accused and his legal counsel, if any.

10. There will be provided sufficient assistant state attorneys available at the first appearance hearing and at the preliminary hearing to assist officers in drafting the charges against the arrested person and to otherwise represent the position of the State of Florida at said proceedings.

11. There will be provided sufficient assistant public defenders to represent, both at the first hearing and at the preliminary hearing, those persons who are entitled to public representation.

12. The magistrate shall allow the defendant a reasonable time to obtain counsel and for such purposes shall, if necessary, postpone setting the preliminary hearing for a period not to exceed forty-eight (48) hours. He shall also, upon request of the defendant, require an officer to communicate a message to such counsel in Dade County as the defendant may name. The officer shall with diligence and without cost to the defendant perform that duty. If the defendant desires private counsel and private counsel cannot be obtained within a reasonable time the magistrate shall continue the cause and release the defendant on his own recognizance, in the custody of another or on bond, or the magistrate may order incarceration of the defendant. If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days. If the magistrate finds the defendant to be indigent, he shall appoint a public defender to represent him.

13. Upon information or complaint under oath the magistrate may arraign the defendant and may accept a plea of guilty or nolo contendere to any offense within the jurisdiction of the Court. If the charged offense is not within the jurisdiction of the Court the magistrate shall set a hearing for the purpose of accepting the plea before a Court with appropriate jurisdiction.

14. Preliminary hearings may be held in any court of competent jurisdiction, such location is to be set by the magistrate at the time of the first appearance hearing.

15. The magistrate, where he has appropriate jurisdiction, may, upon appropriate plea, sentence any defendant either at the first appearance or at the preliminary hearing.

16. If, at the time of the preliminary hearing, it appears to the magistrate that there is probable cause that an offense has been committed and that the defendant committed it, the magistrate shall forthwith order the defendant to answer to the Court having trial jurisdiction; otherwise the magistrate shall discharge the defendant.

17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge.

18. If the magistrate orders the defendant to answer to the Court having trial jurisdiction, he may release the defendant on his own recognizance, in the custody of another, or on bond, or he may order the defendant to be incarcerated. For purposes of the preliminary hearing the magistrate shall issue such process as may be necessary to secure the attendance of witnesses within the state for the state or the defendant. All witnesses shall be examined in the presence of the defendant and may be cross examined. At the conclusion of the testimony for the prosecution, the defendant shall, if he so elects, be sworn and testify in his own behalf and in such a case he shall be warned in advance by the magistrate that anything he may say can be used against him at a subsequent trial. He may be cross examined and whether he testified or not any witness produced by him shall be sworn and examined.

Prior to the examination of any witness in the cause the magistrate may, and on request of the defendant shall, exclude from the courtroom all other witnesses who have not yet testified. The magistrate may cause the witnesses

to be kept separate and prevented from communicating with one another until all are examined.

At the request of the prosecuting attorney or the defense attorney the testimony of the witnesses and the defendant, if he testified, shall be recorded verbatim stenographically or by mechanical means and shall be transcribed and furnished to the requesting attorney. If the testimony or any part thereof is transcribed at the request of either party, a copy of such testimony shall be furnished at cost to the other party. If the defendant is indigent, transcriptions shall be furnished free of cost upon request by the defense attorney.

When the magistrate has discharged the defendant or held him to answer he shall transmit within forty-eight (48) hours thereafter to the clerk of the court having trial jurisdiction of the offense the following information as applicable:

(a) The name of the incarcerated person awaiting trial, the date of incarceration and the charge.

(b) The complaint and the warrant.

(c) The written testimony of the witnesses if transcribed and filed.

(d) The recognizance or undertaking for the apperance of the defendant.

(e) A copy of the order discharging or holding the defendant.

(f) Every article, writing, money or other exhibits received in evidence provided, however, that such article, writing, money or other exhibits so used in evidence before said magistrate may be returned to the owner thereof upon a written order of the magistrate unless the State objects thereto in which case the trial Court will resolve the issue.

19. The following sanctions shall be imposed for failing to bring the defendant before a committing magistrate and/or for failure to hold a preliminary hearing:

(1) If, within twenty-four (24) hours after a defendant's arrest, a first appearance has not been held and/or a magistrate has not set bail for a defendant charged with an offense bailable as of right, the defendant shall immediately be released on his own recognizance.

(2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal.

Postponements may be granted in accordance with the Florida Rules of Criminal Procedure after notice to the parties and an opportunity to be heard.

20. In case of conflict between this plan and applicable Florida Statutes, Florida case law, or the Florida Rules of Criminal Procedure the three last mentioned authorities will apply to the extent that they are not inconsistent with the Court's Opinion and Final Judgment of October 12, 1971.

21. In order to accomplish the purposes of this plan the details herein may be altered as required to keep the system functioning without further approval by this Court.

22. This plan is not intended to apply to violations charged under the various municipal codes.

23. Each law enforcement agency will be responsible for the transportation of its own prisoners and it is not anticipated that this is a responsibility of Metropolitan Dade County.

24. This plan shall be put into effect within ninety (90) days from the date of this order.

II. The Motion of Defendant Gerstein for Rehearing and/or Clarification be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Florida this 25 day of January, 1972.

s/ James Lawrence King

James Lawrence King
UNITED STATES DISTRICT JUDGE

[TITLE OMITTED]

FINDINGS AND CONCLUSIONS RELATIVE THE COMMITTING MAGISTRATE SYSTEM OF DADE COUNTY, FLORIDA

I

HISTORY

This action brought almost two years ago by Florida prisoners held for trial without ever having received an impartial judicial determination of probable cause for their detention, now comes before the court for detailed findings on the extent to which present state practice falls short of meeting constitutional requirements. In an order of October 12, 1972, this court initially ruled that both the fourth amendment and the due process clause of the fourteenth amendment require a prompt hearing before a neutral and detached judicial officer for individuals held for trial solely upon an information filed by a single state attorney. *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D.Fla. 1971).

The court allowed defendants both before and after that ruling an opportunity to voluntarily bring Florida practice into compliance with basic constitutional standards. After this case was initiated on March 22, 1972, the court permitted the pre-trial schedule to be protracted in order that the 1971 Florida Legislature might have an opportunity to consider and act upon the issue. Likewise, the court's October 25 order postponed the question of implementation to provide all defendants 60 days within

which to avail themselves of the opportunity to submit proposals concerning what sort of system for providing prompt preliminary hearings by an impartial judicial officer should be adopted in Dade County, Florida. The only proposal submitted in response to the court's mandate, (which came from defendant E. Wilson Purdy, Sheriff of Dade County) suggested the creation of a committing magistrate system.[1] In the absence of alternative proposals, the Purdy Plan, as it came to be known, was substantially adopted on January 25, 1972 after careful deliberation by the court. *Pugh v. Rainwater*, 336 F.Supp. 490 (S.D.Fla. 1972).

Implementation of the Purdy Plan was delayed at the request of defendants for 90 days to permit adequate time for necessary administrative arrangements. State Attorney Gerstein's subsequent request that the court further delay compliance, pending completion of an appeal, was denied. The Fifth Circuit Court of Appeals granted the requested stay by order of March 31, 1972.

Despite the Fifth Circuit stay, the Dade County judiciary officials moved voluntarily in the hiatus during appeal to establish their own plan for providing preliminary hearings. To effectuate this court's implementation order, a Committing Magistrate Rules Committee was formed by administrative order of Chief Judge Marshall C. Wiseheart of the Eleventh Judicial Circuit of Florida on March 13, 1972. After the stay had been issued, however, the work of the committee independently bore fruit as an administrative order of the Chief Judge created a committing magistrate system on April 15, 1972, which

[1]Defendant State Attorney Gerstein adopted Sheriff Purdy's plan, while reserving his right to pursue appellate remedies.

provided a limited right to a preliminary hearing. Although the requirements of the Dade County Magistrate System did not entirely conform with those of this court's order or those of the Purdy Plan, the differences are now moot in view of subsequent developments.[2] In retrospect, it is only unfortunate that in spite of our efforts to secure alternative proposals, the court did not have the opportunity to consider the plan actually implemented.

The signal development, however, came with the issuance of Amended Rules of Criminal Procedure by the Florida Supreme Court on December 6, 1972. The Amended Rules, which took effect February 1, 1973, contain many of the safeguards contained in this court's plan of January 25, 1972, including provision for preliminary hearings under a committing magistrate system. The State Supreme Court has once again demonstrated that it is not blind to the continued violation of 40-year old state statutes requiring an arresting officer to take the defendant before a committing magistrate *without unnecessary delay*. Fla. Stat. §§901.06 901.23 (1971) (originally enacted as Law of June 12, 1939, ch. 19554, §§6, 23 [1939] Fla. Laws 1300); see e.g. *State ex rel. Carty v. Purdy*, 240 So.2d 480 (Fla. 1970); *Milton v. Cochran*, 147 So. 2d 137 (Fla. 1962).

Upon hearing oral argument on October 18, 1972, in the appeal, the Fifth Circuit entered an order of October 24, vacating its stay of our January 25, 1972 order, directing this court to make specific findings on the constitu-

[2]It should be noted; although defendant State Attorney Gerstein acquiesced in the committing magistrate system, he reserved the right to continue to file direct informations with the Clerk of the Criminal Court of Record.

tional deficiencies of present practice, and authorizing the implementation of the Purdy Plan.[3] In accordance with that mandate, a hearing was set for November 16, 1972, but delayed at the request of defendants until January 18, 1973. On the basis of the presentations of the parties and amicus curiae Dade County Bar Association at that hearing, the following findings of fact and conclusions of law are hereby entered.

The parties agreed and stipulated to the premise, in which the court concurs, that the mandated assessment of present practices must concern itself with state procedures after February 1, 1973, under the Florida Rules of Criminal Procedure as now amended. The parties further agreed and stipulated that, so viewed, only four aspects of present practice differ from the court's plan of January 25, 1972, and remain to pose issues of constitutional dimension in this case.

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[3]The Fifth Circuit order stated:

"[I]t is now

"ORDERED that the stay order heretofore entered is hereby VACATED.

"It having been made to appear on oral argument that with with substantial acquiescence of the Attorney General of the State of Florida, measures have now been instituted to afford some of the relief relating to hearings to determine probable cause for arrest of members of the class represented by named plaintiffs, the trial court is directed to compare in detail the plan incorporated in its order with the present practice, and make specific findings in which it determines to what extent the present practice falls short of meeting constitutional requirements. A copy of its findings shall be furnished to counsel and to this court.

"Pending the completion of such inquiry, the trial court may put into effect such parts of its plan as are consistent with the proposed plan submitted to the court by Sheriff Purdy."

II

THE PRESENT PRACTICE WHICH PERMITS THE STATE ATTORNEY TO FILE AN INFORMATION AND OBVIATE THE REQUIREMENTS OF A DETERMINATION OF PROBABLE CAUSE BY A NEUTRAL AND DETACHED MAGISTRATE DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Rule 3.131(a) of the Florida Rules of Criminal Procedures states:

> "A defendant, *unless charged on an information* or indictment has the right to a preliminary hearing on any felony charge against him.

The Rule is consistent with the longstanding law of Florida. *State ex rel. Hardy v. Blount*, 261 S.2d 172 (Fla. 1972).

The validity of this practice, which permits the State Attorney to be the sole arbiter of probable cause, has always been the main issue in this case.

Not only does the present practice permit the State Attorney to block a preliminary hearing, it also allows him to overrule a determination of no probable cause made by a magistrate by refiling an information. Therefore the whole preliminary hearing system is really conditioned upon the desires of the State Attorney. If he

files an information prior to the preliminary hearing, none will take place. If he files an information after a magistrates detached and impartial determination of no probable cause, the accused may remain in jail until trial.

This practice cannot be reconciled with the constitutional requirement of the due process clause of the fourteenth amendment and the fourth amendment. The continuation of the practice is in clear conflict with the plan previously entered by the court and with the original decision of the court.

In addition to the cases relied upon in that decision (at 336 F.Supp. 1107 et. seq.), recent Supreme Court decisions confirm that the deprivation of liberty caused by the prosecuting attorney without any judicial review is unconstitutional. See: *Morrissey v. Brewer*, ——— U.S. ——— 92 S.Ct. 2503 (June 29, 1972); *Fuentes v. Shevin*, 92 U.S. 1983 (June 12, 1972; *Stanley v. Illinois*, —— U.S. ———, 92 S.Ct. 1208 (April 3, 1972); *Shadwick v. City of Tampa*, —— U.S. ——, 92 S.Ct. 2119 (June 19, 1972), and *United States v. United States District Court*, —— U.S. ———, 92 S.Ct. 2125 (June 19, 1972).

III

THE PRESENT PRACTICE WHICH EXCLUDES MISDEMEANANTS FROM A PRELIMINARY HEARING DIFFERS FROM THE COURT'S PLAN AND VIOLATES THE FOURTH AMENDMENT AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

Rule 3.131(a) of the Florida Rules of Criminal Procedure, as amended, authorizes hearings before a neutral

and detached judicial officer only "on any felony charge." Thus, misdemeanants need not be afforded a preliminary hearing under the present practice, despite the fact that the preliminary hearing provisions of the amended rules provide the only guarantee of prompt determinations of probable cause. Consequently, the accused misdemeanant remains unprotected by present practices against deprivation of his liberty. As the court's original opinion made clear, this deprivation of liberty is particularly unjustifiable as a denial of due process for those misdemeanants who remain in custody without bond. *Pugh v. Rainwater*, 332 F. Supp. 1107. (S.D.Fla. 1971); cf. *Morrissey v. Brewer*, —— U.S. ———, 92 S. Ct. 2593 (1972). The court's plan to effectuate its original order, as well as the proposal of Sheriff Purdy, therefore made no distinction between felony cases and misdemeanors.

However, it is well-settled that "once it is determined that due process applies, the question remains what process in due." *Morrissey v. Brewer*, 92 S.Ct. 2593 2600 (1972) and that the process due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurther J., concurring), quoted in *Goldberg v. Kelley*, 397 U.S. 254, 263 (1970).

Although we think it clear that the deprivation to misdemeanants held in custody unable to meet their bond requires a prompt neutral probable cause determination, the question becomes more difficult as applied to misdemeanants out on bond and those who are charged with violating county ordinances which carry no penalty of imprisonment. We have therefore taken our cue from the Supreme Court in *Argersinger v. Hamlin*, 92 S.Ct. 2006

(1972) and concluded that a neutral determination of probable cause is required by the fourth amendment for all misdemeanants who face potential imprisonment.

However, we are unable to conclude that either due process or the fourth amendment requires a probable cause determination by a judicial officer for those misdemeanants accused of violations which carry no possible imprisonment. *See Shadwick v. City of Tampa.* We think that misdemeanants within this category can properly be screened by a State Attorney for the very reason that his office is not fundamentally concerned with the prosecutions of the barking dog variety, but screens them as a general rule at the request of complaining citizens.

Thus, the State Attorney may not constitutionally obviate preliminary hearings where a potential term of confinement faces the misdemeanant.

The present practice, as embodied in the amended rule, suffers from an additional shortcoming. It creates a classification, based solely on the type of offense, which deprives accused misdemeanants, but not accused felons, of a right long recognized as "fundamental": the right not to be deprived of liberty without due process of law and consistent with the fourth amendment. Thus, although classification of crimes is ordinarily a matter left largely to the states, this categorization touches upon a right "that the court has come to regard as fundamental and that demand[s] the lofty requirement of a compelling governmental interest" to justify it. *In re Kras*, 41 U.S.L.W. 4117, 4121 (January 10, 1973), citing *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

Two such state interests were advanced by defendants with the voluntary cooperation and testimony of the Hon. John A. Tanksley, Chief Judge of the Magistrate Division of the Eleventh Judicial Circuit, as sufficiently compelling to justify the classification. First, the state's interest in assuring misdemeanants a fair and impartial trial. Judge Tanksley testified that Justice Adkins of the Florida Supreme Court wished to inform the court that although the advisory committee which formulated the amended rules had recommended that preliminary hearings be afforded misdemeanants, the Florida Supreme Court had demurred from so providing because of its concern that the same magistrate who determined probable cause in a misdemeanor case might end up trying that very case thereby denying the defendant a fair and impartial trial. Although the state's interest in providing fair and impartial fact-finders is doubtless both a laudable and compelling one, Judge Tanksley went on to testify that preliminary hearings and misdemeanor trials are conducted by separate panels of judges under the present practice in Dade County. While he could not speak for practice in the remainder of the state, we are not in this suit faced with practices outside Dade County.

The second compelling interest suggested by defendants was that of expense to the state to provide preliminary hearings for misdemeanants. Judge Tanksley testified that if the five Dade County judges assigned as magistrates were to provide preliminary hearings for misdemeanors as well as felonies their caseload might increase by as much as 30 to 35,000 cases a year, or approximately 3,000 a month. He acknowledged, however, that these projections represented an upper limit, and that figure might be considerably reduced in practice due to waivers of preliminary

hearings and guilty pleas. He also acknowledged that a large part of the misdemeanor caseload consists of county penal violations, formerly heard by justices of the peace, which are now classified as misdemeanors as a result of the state court reorganization act. He characterized these as the "barking dog" and "loud parties" cases. Since these cases, which do not involve potential imprisonment, are not affected by the court's order, we conclude that the increase in the magistrate's caseload from providing preliminary hearings to misdemeanants who face potential imprisonment will fall considerably short of Judge Tanksley's projection and, if substantial, will not be overly burdensome. The court, concludes, however, that while more magistrates as well as courtroom facilities may be needed as a result of our order, and that costs may increase in the short run, it will not be a significant increase.

Judge Tanksley also testified, however, that despite dark predictions to the contrary by defendants at the time of this court's initial order, the magistrate's system has been highly successful in felony cases. He estimated that, as a result of the magistrate system, felony caseloads have been reduced by 20 to 25 percent, with corresponding savings to the taxpayers of Dade County. We are pleased to learn that there is now evidence to support our prediction that

> "[t]he expense of maintaining a jail, with many persons who would never be there in the first instance if their case had been reviewed by a judge in an effective committing magistrate system, will be substantially less than its present cost and will certainly be a tangible benefit to all citizens of this community," 332 F.Supp. at 1114.

Although we acknowledge that a state has a proper interest in maintaining its fiscal integrity and may legitimately attempt to limit its expenditures, it is well settled that a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. *Shaprio v. Thompson*, 394 U.S. 618, 633 (1969). In the case before us, defendants must do more than show that denying due process to misdemeanants will save money. In the absence of other suggestions of compelling interests, we must conclude that present practice deprives misdemeanants of equal protection of the law, in addition to due process and fourth amendment guarantees.

IV

THE PRESENT PRACTICES WHICH PROVIDE DIFFERENT TIMES FOR PRELIMINARY HEARINGS FOR THOSE CHARGED WITH CAPITAL OFFENSES OR OFFENSES PUNISHABLE BY LIFE IMPRISONMENT DIFFER FROM THE COURT'S PLAN AND VIOLATE THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT AND THE FOURTH AMENDMENT.

Rule 3.131(b) of the Florida Rules of Criminal Procedure provide:

> "In all cases where the defendant is in custody, except capital offenses or offenses punishable by life imprisonment, the preliminary hearing shall be held within 72 hours of the time of the defendant's first appearance. *In all capital offenses and*

offenses punishable by life imprisonment and in all cases where the defendant is not in custody *the preliminary hearing shall be held within seven days of the time of defendant's first appearance.*" (emphasis added).

The present practice, as set forth in that rule, differs from the courts' plan and Sheriff Purdy's plan only insofar as it excludes the two enumerated categories of offenses from the established time frame of four days.[4]

By creating a separate classification for persons accused of capital offenses or offenses punishable by life imprisonment, the practice suffers an equal protection infirmity similar to that caused by the total exclusion of misdemeanants from a preliminary hearing. The court finds no compelling governmental interest which justifies the classification. cf. *In re Kras, supra*, and *Shaprio v. Thompson, supra.*

By failing to set the same time requirements for capital and life imprisonment cases as compared to other felonies, their present practice condones an extended deprivation of liberty without a hearing.

The timeliness of the preliminary hearing has been a constant concern of this court. The court recognizes that tolerating a deprivation of liberty for four days, absent a judicial determination of probable cause, is questionable.

[4]The court plan had required initial appearance within three hours of arrest and preliminary hearing within four days thereafter. The new Florida Rules require initial appearance within 24 hours, and preliminary hearing 72 hours (3 days) thereafter. Thus the crucial time of preliminary hearing is hastened by three hours under the Florida Rules, except for the persons falling into the classification set forth above.

In *Argensinger v. Hamlin*, 407 U.S. 25 (1972) the court prohibited a denial of liberty for one day absent counsel. Here we are condoning a denial of liberty for four days absent a hearing. Property rights have consistently been protected by a hearing prior to the taking. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

Thus, while four days may be a reasonable time to allow witnesses to be summoned and other mechanical tasks performed, an eight day (24 hours for initial appearance plus seven days) deprivation of liberty is not reasonable. For the reasons set forth in the original *Pugh v. Rainwater* decision and upon the recent decisions of the Supreme Court cited *infra*. The court finds that the present practice of not setting the same time requirement for all persons who will be proceeded against by information violates the fourth and fourteenth amendments.

V

THE FAILURE OF THE PRESENT PRACTICE TO PROVIDE SANCTIONS FOR FAILURE TO CONDUCT THE PRELIMINARY HEARING AND THE REFILING OF AN INFORMATION IF A DEFENDANT IS DISCHARGED DIFFERS FROM THE COURT PLAN AND RESULTS IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS.

The present practices provide no sanction for the failure to accord a preliminary hearing or for the refiling of an information after determination of no probable cause. They do not, because Florida law tolerates the use

of the information process in lieu of a probable cause determination by a neutral and detached magistrate. Rule 3.131(a), Florida Rules of Criminal Procedure. The court plan did contain sanctions. If a preliminary hearing was not accorded within the time period set and there was not a waiver or proper postponement, then the defendant was to be discharged and the charges withdrawn. However they could be refiled, but if the preliminary hearing was not accorded thereafter, then the defendant was to be discharged and not held again to answer except upon an indictment returned within 30 days of the second withdrawal. *Pugh v. Rainwater*, 336 F.Supp. at 493. If a magistrate made a determination of no probable cause and discharged the defendant, the defendant could not be recharged except upon a grand jury indictment returned within thirty days of the discharge. *Pugh v. Rainwater*, 336 F.Supp. at 492.

The Court of Appeals requested this court to make specific findings to determine the extent to which the present practice is constitutionally invalid. The failure to provide sanctions is not, of itself, an unconstitutional infirmity. It is the failure to accord probable cause hearings, which offends the Constitution. Thus, the lack of sanctions is invalid only insofar as the failure to provide sanctions results in a system which tolerates the denial of, or overruling of, a preliminary hearing. This is a corollary of the very first finding made above.

The courts, for far too long, have been blind to what all others see. We have operated under a conceptualism which no longer corresponds to the reality in many parts of the nation as increasingly crowded criminal dockets. [sic] The hard fact is that in many of our overburdened judi-

cial systems state as well as federal, it may be a matter of weeks before even direct informations are filed, as was the situation in Dade County when this suit was brought, and a matter of months before the accused is brought to trial. In the interim, those unable to post bail suffer what can only be understood as a grave deprivation of liberty, however it may be theoretically justified.

Therefore the court finds that the failure of the present practice to provide a remedy for the denial of a preliminary hearing or the overruling of a preliminary hearing by use of the information process, insofar as that failure tolerates and condones such denials or overrulings, results in a violation of the fourth and fourteenth amendments. See the cases cited in *Pugh v. Rainwater*, 332 F.Supp. 1107 (S.D. Fla. 1971) and the more recent cases of *Morrissey v. Brewer*, *Fuentes v. Shevin*, *Stanley v. Illinois*, *Shadwick v. City of Tampa*, and *United States v. United States District Court*, supra, which fully support the proposition that the taking of a person's liberty absent a hearing by a neutral and detached magistrate, is unconstitutional.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 16 day of February, 1973.

JAMES LAWRENCE KING
UNITED STATES DICTRICT
JUDGE

[TITLE OMITTED]

June 1, 1973

TO ALL COUNSEL OF RECORD

No. 72-1585 — Pugh v. Rainwater

Gentlemen:

The Court has directed that this letter be sent.

A hurried reading of Judge King's memorandum order and opinion of February 16, 1973 (filed with this Court on March 12, 1973) indicates to the Court that he has, in response to our previous order of October 24, 1972, and in accordance with a stipulation by the parties as to the effect of the promulgation of the new Florida Rules of Criminal Procedure on the pending appeal in the Fifth Circuit, undertaken to rule specifically on four aspects of the new rules:

(i) that insofar as Rule 3.131(a) still authorizes the incarceration of a person against whom an information has been filed without a probable cause hearing by a detached magistrate, it violates due process;

(ii) that the failure of the Rules to provide a probable cause hearing for misdemeanants denies that class of people both due process and equal protection;

(iii) that the allowance of different periods of delay prior to the probable cause hearing for those accused of felonies for which a life sentence could be imposed (7 days) than for those for whom a shorter limited period of imprisonment would be the maximum (3 days) denies those subject to the longer period of delay due process and equal protection; and

(iv) that insofar as the failure of the Florida Rules to provide explicit remedies for failure to comply with the requirements imposed by the holding as to (i) above sanctions or encourages the incarceration of defendants without a probable cause hearing it results in a violation of the Fourth and Fourteenth Amendments.

In order that the Court may have a full and proper understanding of the issues which it must now resolve in light of the changed factual circumstances in the Florida practice, the stipulation by the parties as to the effect of these changes on this case, and the subsequent opinion of Judge King of February 16, 1973, the Court directs counsel to file within 7 days from the receipt of this communication typewritten memoranda addressing themselves to the following issues as well as any not specified but which in counsel's opinion are related and significant.

First, to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490? [sic] Specifically, assuming that the declaratory provisions of Judge King's supplemental order of February 16, 1973, are sustained by this Court on appeal, to what extent are the very

specific provisions of his prior decree either necessary or desireable? In this regard counsel should include with their memoranda a proposed order and decree which this Court could direct the District Court to enter dealing specifically with their contentions. This should be constructed so that each of the principal issues outlined are separately stated to permit ready adaptation depending on which, if any, of the holdings are sustained. Since this is so requested on the hypothesis that each is sustained, the Court is hopeful that all counsel could join in a proposed decree or at least indicate differences specifically. With the proposed decree(s) with explanatory memoranda the Court will be able to determine the extent to which the decree to be mandated should or must contain definitive details as to mechanics, sanctions, and the like.

Second, our hurried consideration of the supplemental order raises some concern that there are no parties before the Court with standing to raise the equal protection issues treated in parts (ii) and (iii), *supra*, of Judge King's supplemental order. Are there any accused misdemeanants threatened with loss of liberty by the operation of the new Florida Rules before the Court? Are there any parties to this litigation who are accused of felonies which could result in a life sentence and who are substantially affected by the operation of the new Florida Rules so as to have standing to assert the claim that the longer period of delay violates equal protecion?

Third, and in a more general sense, to what extent does the supplemental opinion and the stipulation of counsel alter, reduce or eliminate one or more or all of the objections or attacks made on the District Court's initial opinion and detailed decree which were the subject of this

appeal as submitted on oral argument? In summary, just what if anything is left of this appeal?

The Court appreciates the continued cooperation of counsel. The memoranda are to be filed in clear typewritten copies, one to the Clerk, one copy to each of the Judges at his home station. These may be filed simultaneously with the privilege of replies, rejoinders, etc., as thought helpful.

Very truly yours,

/s/ Edward W. Wadsworth,

EDWARD W. WADSWORTH,
Clerk

cc: Honorable John R. Brown, Chief Judge
U.S. Court of Appeals
11501 U.S. Courthouse, 515 Rusk Ave.
Houston, Texas, 77002

Honorable Elbert P. Tuttle
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[TITLE OMITTED]

JOINT MEMORANDUM IN RESPONSE TO COURT'S LETTER OF JUNE 1, 1973

(Filed June 8, 1972)

Pursuant to the Court's letter of June 1, 1973, counsel for the plaintiffs, the amicus curiae and the State Attorney conferred and jointly submit this response to the Court.[1]

The Court asked this question: "In summary, just what if anything is left of this appeal?" The parties and amicus curiae all agree that the major substantive legal issue remains intact. That issue is:

> DO THE FOURTH AND FOURTEENTH AMENDMENTS REQUIRE THAT ONE WHO IS ARRESTED AND HELD FOR TRIAL BE GIVEN A HEARING BEFORE A JUDICIAL OFFICER TO DETERMINE PROBABLE CAUSE EVEN IF AN INFORMATION HAS BEEN FILED AGAINST HIM BY A STATE ATTORNEY?

The State Attorney's unequivocal position is, and has always been, that an information filed by him or one

[1]Mr. Barry Richard, Assistant Attorney General, was unavailable for consultation. However Mr. Richard's concern in this case has been with the bail issue posed in the companion matter, No. 72-1223. Mr. Mellon, from the State Attorney's office has been solely responsible for the preliminary hearing issues which were the subject of the Court's letter. Mr. Mellon is a signatory to this memorandum.

of his assistants is sufficient to determine probable cause and that the filing of an information obviates any right to a preliminary hearing before a judicial officer. That position is consistent with present and past Florida law. It is that issue which has been at the heart of this suit since its inception. If the Court inferred from Judge King's February 16, 1973, order that that controversy was stipulated away, it was mistaken. The plaintiffs and the amicus curiae agree that the issue posed is alive, and a continuing dispute.

* * * *

The Court asked: ". . . to what extent does Judge King's order of February 16, 1973, supersede his prior formal definitive decree of January 25, 1972, 336 F.Supp. 490?" and ". . . to what extent are the very specific provisions of his prior decree either necessary or desireable?"

The order at 336 F.Supp. 490 sets forth the procedures for implementing the substantive decision reported at 332 F.Supp. 1107. Given the plan instituted by the County and the new Florida Rules of Criminal Procedure, the parties agree (except as to two points set forth below) that the February 16, 1973, order does, in effect, supersede the mechanical plan. In other words, except in the two areas designated below, if the declaratory provisions of Judge King's February 16 order are sustained, there is no longer any need for this Court to issue an order detailing how a committing magistrate system must work.

The parties also agree that the February 16, 1973, order restates and amplifies the original order at 332 F.Supp. 1107.

* * * *

The two areas referred to above are these: (1) the time between arrest and preliminary hearing and (2) the sanctions.

(1) Judge King's order held: "If incarceration is ordered, the magistrate must immediately schedule a preliminary hearing to be held within four (4) days [of initial appearance]." 336 F.Supp. at 492. In his February 16 order Judge King noted that the new Florida Rules mandate preliminary hearing within 72 hours, or 3 days of initial appearance.[2] That appearance is required within 24 hours of arrest.[3] Thus the total time lapse between arrest and preliminary hearing appeared to Judge King to be 4 days, which would have been consistent with his previous order.

However, Rule 3.040 of the Florida Rules of Criminal Procedure states:

> "When the period of time prescribed or allowed shall be less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation."

Thus a six day lapse is tolerated. The plaintiffs and the amicus curiae believe that a four day lapse between arrest and determination of probable cause is the constitutionally tolerable maximum. Since due process usually requires a hearing *prior* to the taking of property or liberty, it is argued that a *subsequent* hearing must occur within the shortest possible time.

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[2]Rule 3.131(b), Florida Rules of Criminal Procedure.

[3]Rule 3,130(b)(1), Florida Rules of Criminal Procedure.

The State Attorney believes, inter alia,[4] that clerical or logistical needs, and laboratory analysis time in narcotics cases, necessitate the current time frame. Plaintiffs rejoinder is that more personnel should be hired.

• • • •

(2) The State Attorney does not agree with plaintiffs and amicus curiae regarding sanctions. The State Attorney's position is set forth in his supplemental letter.

The relevant sanction provisions of Judge King's original order were:

> "17. If the magistrate discharges the defendant, the defendant shall not be required to answer to a subsequent charge for the same offense(s) except upon an indictment by the Grand Jury which shall have been returned within thirty (30) days of the defendant's discharge."

336 F.Supp. at 492.

> "19 . . . . (2) If a defendant is not afforded a preliminary hearing within the applicable period set forth in paragraph (8) herein and the hearing is not properly postponed or waived, then all charges shall be withdrawn and the defendant, if incarcerated, shall immediately be released. The State shall be permitted to refile a charge so withdrawn, however, in the event a charge is twice withdrawn pursuant to this provision, the defendant shall not again be held to answer to that charge except upon an indictment of the Grand Jury returned within thirty (30) days of the date of the second withdrawal."

336 F. Supp. at 493.

[4]The State Attorney is filing a supplemental letter to elaborate on his position regarding this point and the sanction issue.

Plaintiffs and amicus curiae agree that if the Court finds for the plaintiffs the sanctions set forth above are appropriate.

• • • •

In its letter, the Court asked for proposed orders and decrees with regard to the specific enforcement provisions. Since this memorandum has hopefully made it clear that only two areas need be addressed in that regard, undersigned counsel for plaintiffs and amicus curiae respectfully take the liberty of making those proposals within this memorandum.

As to sanctions, the plaintiffs and amicus curiae urge that the District Court be directed to enter a fresh order imposing the sanctions quoted above after discharge by a magistrate and for failure to provide preliminary hearings.

As to the appropriate time for preliminary hearings, plaintiffs and amicus curiae submit that this Court should, after it makes it substantive Fourth and Fourteenth Amendment conclusions, order:

> "That persons arrested and incarcerated shall be given a judicial hearing to determine probable cause within four (4) days from the time of their arrest.[5]

[5]For those persons not in custody, Florida Rule of Criminal Procedure 3.131(b) provides that the preliminary hearing be held within seven days of first appearance. Plaintiffs and amicus curiae have no objection to that time period.

The State Attorney objects to the four day period for the reasons mentioned above and those set forth in the supplemental letter to be filed by the State Attorney.

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The Court asked if the plaintiffs have standing to raise the equal protection issues relating to misdemeanants and felons charged with offenses carrying life sentences. All parties agree that plaintiffs have standing. Plaintiff Robert Pugh was charged with robbery (App. p.2) a crime which was, and is punishable by life imprisonment. Plaintiff Nathaniel Henderson was charged with assault and battery (App. p. 19) which was, and is, a misdemeanor under Florida law. Both the original and intervening complaints were brought as class actions on behalf of all persons arrested by law enforcement officers in Dade County who are detained solely upon a direct information (App. 3, 40) and the Court below found that method of litigation to be appropriate. 332 F.Supp. 1107 at 1115.

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The undersigned counsel for the named parties respectfully submit this memorandum.

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WE HEREBY CERTIFY that a true and correct copy of the foregoing Joint Memorandum in Response to Court's Letter of June 1, 1973, was mailed this 7th day of June, 1973, to BARRY RICHARD, Asst. Attorney General of Florida, State Capitol, Tallahassee, Florida.

By /s/ Bruce S. Rogow

Bruce S. Rogow

[TITLE OMITTED]

ORDER OF DISMISSAL

This action came on before the court upon plaintiff's motion for a preliminary injunction. The court, having considered the record and being fully advised in the premises, finds and concludes that the action must be dismissed for lack of jurisdiction. Plaintiffs seek what amounts to a temporary injunction of a pending state court proceeding, but entirely fail to allege such bad faith and harrassment as would justify federal intervention in a state criminal proceeding. *Younger v. Harris*, 401 U.S. 37 (1971). The only other basis upon which this court could conceivably have jurisdiction results from our decision in *Pugh v. Rainwater*, 332 F.Supp. 1107 (D.Fla. 1971). [sic] But even if plaintiffs could make a showing that they are entitled to relief as members of the class protected by the *Pugh* decision, the present posture of that case forecloses such a result. Implementation of the Purdy Plan, which provided for preliminary hearings, was ordered by this court on January 25, 1972, *Pugh v. Rainwater*, 336 F.Supp. 490 (S.D. Fla. 1972), but was stayed by the Fifth Circuit pending appeal. By order of October 25, 1972, the Fifth Circuit directed this court to make specific findings on the constitutional deficiencies of present practice, and authorized the implementation of the Purdy Plan. In complying with the Fifth Circuit's directive with findings of fact and conclusions of law issued February 16, 1973, this court declined to order immediate implementation of the Purdy Plan, pending resolution of the

direct information issue on appeal. Thus, defendants in the above-styled action are now under no duty to provide preliminary hearings, except as such a duty may be imposed by state law, as plaintiffs allege. Plaintiffs proper remedy for any state law violations lies, of course, in appeal to the state courts. Therefore, it is,

ORDERED and ADJUDGED that the above-styled action be and the same is hereby dismissed.

DONE and ORDERED in chambers at the United States District Courthouse, Miami, Dade County, Florida, this 20th day of March, 1973.

JAMES LAWRENCE KING

JAMES LAWRENCE KING
United States District Judge

cc: Jack Nagley, Esq.
Hon. Dan Satin
Hon. Ellen Morphonios Rowe
Hon. Richard Gerstein

RECORD ON APPEAL PAGE 505

Appellant Gerstein's Motion For Summary Judgment, etc.

The undisputed facts in this case are as follows:

1. The Plaintiffs have both been charged with violations of the Florida Statutes.

2. They have been charged by Information (which Informations are attached to the Complaint as Exhibits A and B), as permitted by Article I, Section 15(a) of the Florida Constitution.

3. That prior to the filing of the Information there was no Preliminary Hearing.

4. That the Informations were filed by the Defendant-Gerstein, or by one of his duly appointed Assistant State Attorneys, under and by his authority.

5. It is the policy and practice of the Defendant-Gerstein, his agents, servants and employees to file Informations based on independent examination of the facts, notwithstanding the result of any Preliminary Hearing, if any, and notwithstanding that there has been no Preliminary Hearing.

6. It is the policy and practice of the Defendant-Gerstein, his agents, servants, and employees to resist any attempt to have Preliminary Hearing after an Information has been filed or an indictment has been found.